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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 28

FRED LEVY ET AL., APPELLANTS,

vs.

JOHN B. LEWIS, SELDEN R. GLENN, AND HENRY M. CLINE, ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY

FILED MARCH 25, 1932

(36,643)

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[fol. 1] [Caption omitted]

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IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY

FRED LEVY, ARNOLD H. LEVY, STUART G. LEVY, JAMES H. Levy and S. L. Greenebaum, Partners, Trading and Doing Business under the Firm Name of Levy Bros., Plaintiffs,

vs.

JOHN B. LEWIS, SELDEN R. GLENN and HENRY M. CLINE, Individually and as Members of the State-Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, Defendants

Bill of Complaint—Filed Jan. 24, 1931.

The plaintiffs, Fred Levy, Arnold H. Levy, Stuart G. Levy, James H. Levy and S. L. Greenebaum, partners trading and doing business under the firm name of Levy Bros., bring this bill of complaint against the defendants, John B. Lewis, Selden R. Glenn and Henry M. Cline, indi- [fol. 4] vidually and as members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky and say:

I

The plaintiffs, Fred Levy, Arnold H. Levy, Stuart G. Levy, James H. Levy and S. L. Greenebaum, are now and for more than five years past have been partners trading and doing business in Louisville, Kentucky, under the firm name of Levy Bros.

The plaintiffs are each and all citizens of the State of Kentucky and residents of Louisville, Kentucky, and inhabitants of the Western District of Kentucky.

The defendants, John B. Lewis, Selden R. Glenn and Henry M. Cline, are the duly and legally appointed, qualified and acting members, and the only members, of the State

Tax Commission of the Commonwealth of Kentucky, which is a Commission created pursuant to an Act of the General Assembly of the Commonwealth of Kentucky and at all times herein mentioned invested by the law of Kentucky with the duty of administering and enforcing all tax laws of the Commonwealth that are validly or constitutionally enacted.

The defendant, Clell Coleman, is now the duly elected, qualified and acting Auditor of Public Accounts of Kentucky.

[fol. 5] Said defendants, John B. Lewis, Selden R. Glenn, Henry M. Cline and Clell Coleman, are all citizens and residents of the Commonwealth or State of Kentucky. The said John B. Lewis and Selden R. Glenn are inhabitants of the Western District of Kentucky, and said defendants, Henry M. Cline and Clell Coleman, are inhabitants of the Eastern District of Kentucky.

II

Under and by virtue of the terms of an Act of the General Assembly of Kentucky at its 1930 session herein referred to, which was approved by the Governor of the Commonwealth of Kentucky on March 17, 1930, but is void for the reasons hereinafter set out (said Act being officially published as Chapter 149 of the Session Acts of 1930, at pages 475 to 482), it is provided that the defendant members of the State Tax Commission of Kentucky shall be, and they are, charged with the duty of preparing blank forms for certain retail merchants operating in Kentucky, stores as defined in said Act, and with the further duty of ascertaining from them information as to the amount and volume of gross sales made by such retail merchants, and of ascertaining and fixing the amount of license taxes due from all such retail merchants operating stores in Kentucky as defined in said Act, and with the further duty of employing clerical and other assistants to carry out the duties attempted to be imposed by said Act upon said State Tax [fol. 6] Commission, and further charged with the duty generally to administer and to enforce the provisions of said Act as therein set out.

It is further provided in said Act that the defendant, Clell Coleman, as Auditor of Public Accounts of Kentucky, shall be, and he is, charged under said Act with the duty

of collecting and of directing the disbursement of all taxes that may be levied or assessed or fixed by said State Tax Commission under or pursuant to the terms of said Act.

III

This suit arises under the Constitution or laws of the United States and the amount in controversy herein exceeds the sum or value of $3,000.00, exclusive of interest and costs.

This is a suit of a civil nature and is brought in equity for the purpose of enjoining the defendants and each of them from enforcing or attempting to enforce said Act of the General Assembly of Kentucky, being Chapter 149 of the Session Acts of 1930, approved by the Governor of the Commonwealth on March 17, 1930, and for the purpose of enjoining the defendants or any of them from requiring of the plaintiffs and other taxpayers similarly situated as hereinafter set forth, the reports which said Act purports to require of retail merchants as the term "retail merchant" is defined in said Act, or any information in reference to sales made by the plaintiffs or any of said retail merchants similarly situated, as hereinafter set forth, or [fol. 7] from collecting or seeking to collect from the plaintiffs or any of said retail merchants similarly situated any tax purporting to be levied or assessed upon the plaintiffs or any of said retail merchants similarly situated, as hereinafter set forth, or from instituting any prosecution against the plaintiffs or any of said retail merchants similarly situated as hereinafter set forth, to recover any of the penalties sought to be imposed by said Act upon the plaintiffs or any of said retail merchants similarly situated as hereinafter set forth, for a violation of any of the terms of said Act.

IV

At a regular session of the General Assembly of the Commonwealth of Kentucky held at the seat of government of the Commonwealth, beginning January 6, 1930, to-wit, on January 21, 1930, there was introduced into the House of Representatives a bill known as House Bill No. 111, which by its terms provided for a license or excise tax upon each merchant doing business in Kentucky, which term "merchant" was defined in said bill as originally in-

troduced to mean and include every person, association, copartnership or corporation engaged in the buying and selling of goods, wares or merchandise at any store, stand or place in Kentucky occupied for that purpose, said excise or license tax being graduated in said bill as introduced as follows:

[fol. 8] For each merchant conducting not more than one store, an annual license tax of $25.00, and

For each merchant conducting his business in more than one store, an annual license tax of $25.00 for the first store; $37.50 for the second store; $50.00 for the third store; and on each additional store so conducted by him, a tax in an amount to be determined by adding $12.50 consecutively for each such additional store so conducted by him.

Said House Bill No. 111 so introduced into the House of Representatives on January 21, 1930, was read on the day of its introduction by the following title as endorsed upon said original bill and as entered upon and shown by the official Journal of the House of Representatives for that day:

"H. B. 111, An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

Immediately upon its introduction in the House of Representatives and its reading by the title above set forth, said House Bill No. 111 was referred to the Committee on Kentucky Statutes in the House of Representatives, which Committee, on February 14, 1930, reported said bill with a substitute therefor, which substitute was likewise read, as shown by the Journal of the House of Representatives, in full as "An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

Thereafter a second reading of said bill was had in the House of Representatives on February 18, 1930, and a [fol. 9] third reading thereof had on February 19, 1930, and on each of said second and third readings said House Bill No. 111, as shown by the journals of the House of Representatives, was not read in full but was read only by the title above set forth, to-wit: "An Act to restrain

the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

Upon the third reading of said bill by said title, it was passed by the House of Representatives, and after its passage its title was amended, as shown by the House Journal, and the bill was then sent to the Senate, where it was likewise read the first time in full, and the second and third times only by its title, and thereupon, on its third reading, was passed by the Senate and returned to the House of Representatives, in which it originated, where it was later, on March 7, 1930, as shown by the Journal of the House of Representatives, reported by the Committee on Enrollment, having been examined and found to be correctly enrolled under its title as hereinabove set forth, to wit: "House Bill 111, An Act to restrain unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

Thereupon the bill, having been enrolled, was signed by the Speaker of the House of Representatives and by the President of the Senate, and sent to the Governor of the Commonwealth, who on March 17, 1930, returned it to the [fol. 10] House of Representatives with his approval in writing appended thereto.

By its terms said bill, being thus passed and approved, became effective on March 17, 1930, and it is now officially published in the Session Act of 1930 as Chapter 149 of the Acts of 1930, approved March 17, 1930.

V

Said House Bill 111 was introduced into the House of Representatives in response to a recommendation made to the General Assembly by the Governor of Kentucky in his annual message of January, 1930, that legislation be enacted to curb the competition of so-called chain stores with owners of so-called independent unit stores individually owned and operated, and in aid of such individually owned and operated stores.

While said House Bill 111 was pending before the House Committee to which it was referred upon its introduction, the case of Jackson v. State Board of Tax Commissioners of Indiana was decided on February 1, 1930, in which a measure similar in legal effect to said House Bill 111 as

originally introduced was held violative of the Fourteenth Amendment to the Constitution of the United States and therefore void, as shown by the opinion in that case, reported in 38 Federal (2d) at pages 652-659.

Thereupon the nature, but not the purpose of said House Bill 111 was changed by amendment by the Committee to [fol. 11] which it had been referred, and that measure as so amended and passed in the manner hereinbefore set out and approved by the Governor was so framed as to contain the obnoxious and unconstitutional features hereinafter set out.

VI

Said House Bill 111 as finally passed and approved and now published officially as Chapter 149 of the Acts of 1930 provides in full as follows:

"An Act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act.

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"§ 1. The words 'retail merchant,' as used in this act, shall mean and include every person, firm, association, copartnership or corporation opening, establishing, operating or maintaining any 'store,' as defined herein, for the purpose of and selling goods, wares or merchandise at retail in this State, except those actually engaged in gardening or farming and selling garden or farm products raised by them in this State. The term 'store,' as used in this act, shall be construed to mean and include any store or stores or any mercantile establishment or establishments in this [fol. 12] State which are owned, operated, maintained or controlled by the same 'retail merchant,' as defined herein, either domestic or foreign, in which goods, wares or merchandise of any kind are sold at retail. The provisions of this act shall be construed to apply to every 'retail mer-

chant' and 'store,' as defined herein, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

"§ 2. Every retail merchant, as defined herein, shall pay an annual license tax for the opening, establishing, operating or maintaining of any store or stores, as defined herein, determined by computing the tax on the amount of gross sales as follows:

"One-twentieth of one per cent of the gross sales of Four hundred thousand ($400,000.00) Dollars or less; two-twentieths of one per cent on the excess of the gross sales over Four hundred thousand ($400,000.00) Dollars and not exceeding Five hundred thousand ($500,000.00) Dollars; five-twentieths of one per cent on the excess of the gross sales over Five hundred thousand ($500,000.00) Dollars and not exceeding Six hundred thousand ($600,000.00) Dollars; eight-twentieths of one per cent on the excess of the gross sales over Six hundred thousand ($600,000.00) Dollars and not exceeding Seven hundred thousand ($700,000.00) Dollars; eleven-twentieths of one per cent on the excess of the gross sales over Seven hundred thousand ($700,000.00) Dollars and not exceeding Eight hundred thousand ($800,000.00) Dollars; fourteen-twentieths of one per cent on the excess of the gross sales over Eight hundred thousand ($800,000.00) Dollars and not exceeding Nine hundred thousand ($900,000.00) Dollars; seventeen-twentieths of [fol. 13] one per cent on the excess of the gross sales over Nine hundred thousand ($900,000.00) Dollars and not exceeding One million ($1,000,000.00) Dollars; one per cent on the excess of the gross sales over One million ($1,000,000.00) Dollars.

"§ 3. Every retail merchant, as defined herein, in order to ascertain the amount of taxes due and payable under the next preceding section, shall file with the State Tax Commission on or before the first day of February each year a written report verified by the affidavit of the owner or chief officer on such forms as it may prescribe, giving the number and location of its store or stores, as defined herein, the name and post office address of its owner or principal officer, the name and address of its officer or agent in charge of its business at each separate store, the

nature and kind of business, the total gross sales during the preceding year ending the thirty-first day of December, and such other facts bearing on the proper taxation as the Tax Commission may require.

"The State Tax Commission may, in any case, require such additional information as it may deem necessary to enable it to perform its duties herein. It shall be the duty of the State Tax Commission from such reports, and from such additional information, as it may obtain, to ascertain the amount of taxes due, and to certify to every such retail merchant the amount of taxes due for the preceding year, based upon such reports and information as it may ascertain. Upon final action by the State Tax Commission, it shall certify to the Auditor of Public Accounts and to the retail merchant the amount of such tax due by each retail merchant, as defined herein, and it shall be the duty of each retail merchant to pay the amount of such tax to the Auditor of Public Accounts not later than thirty days thereafter. [fol. 14] "In reporting the gross sales for the year, 1930, retail merchants shall include only those sales made between the date that this act becomes effective and December 31, 1930, and the license tax due for the year 1930 shall be based on the amount of those sales only.

"§ 4. The license or excise tax levied herein, shall not be in lieu of any special state license, excise, occupational or corporation license tax due under the provisions of any law now in force, or that may hereafter be enacted. Should any retail merchant, as defined herein, be liable for and pay any special state license, excise, occupational or corporation license tax under the laws now in force, or that may hereafter be enacted, credit may be taken on the tax levied in this act for the amount of such special license, excise, occupational or corporation license tax so paid not to exceed the amount of the license or excise tax levied herein.

"§ 5. If any retail merchant, as defined herein, neglects or refuses to file the verified report or pay the tax due at the time herein provided, the amount thereof with an addition of a penalty of twenty per centum thereof, with interest at the rate of six per centum per annum from the date when due until paid, shall be collected on an account settled by the State Tax Commission as other taxes are settled and collected; and if collected by proceedings in any

court, an additional penalty of twenty per centum shall be collected, as is authorized to be collected in revenue agent's proceedings under Section 4263-4 of the Kentucky Statutes.

"The said twenty per centum penalty thereon and interest due shall be paid into the State Treasury as part of the tax, and the twenty per centum penalty collected in revenue agent's proceedings shall be distributed as provided in section 4263-4 of the Kentucky Statutes.

[fol. 15] "§ 6. The State Tax Commission, or any assistant or representative thereof, appointed in writing by it, is hereby authorized to examine the books, records, papers, files and equipment of any retail merchant, as defined herein, made taxable by this act, and to that end, shall have the power to examine witnesses under oath to verify the accuracy of any return made under the provisions of this act, or to ascertain whether or not any tax is due under the provisions of this act by any retail merchant; and in the collection of said tax, the State Tax Commission shall have the power to institute legal proceedings for the purpose of ascertaining the amount of tax due and the collection thereof with the penalties thereon, and the State Tax Commission shall be vested with all the powers under the law of the State for the collection of taxes. The State Tax Commission may, at or after the commencement of an action for the purpose of collecting the amount of tax due and penalties and interest due thereon, as set out herein, have an attachment against the property of the defendant, including garnishees, without the execution of a bond upon the filing of an affidavit showing the nature of the claim, that it is just, the sum which the State Tax Commission believes the plaintiff ought to recover and that the collection of the demand will be endangered by delay in obtaining judgment or a return of no property found. Any information gained by the State Tax Commission, or any assistant, agent or representative thereof, as a result of the reports, investigations or verification herein required to be made, shall be confidential, and any person divulging such information shall be guilty of a misdemeanor, and, upon conviction, shall be fined not exceeding Five Hundred ($500.00) Dollars; provided, that this prohibition shall not extend [fol. 16] to information required in prosecutions for mak-

ing false reports or returns or in the preparation and prosecution of legal proceedings, for the collection of any tax due under the provisions of this act, or any prosecutions for any other infraction of the tax laws of this State.

"§ 7. Any retail merchant, as defined herein, or any officer, director, trustee or agent, who shall fail, neglect or refuse to make the reports and pay the tax herein prescribed, or shall refuse to permit the State Tax Commission, its assistants, agents or representatives appointed by it in writing to examine the books, records, papers, files and equipment of such retail merchant, as defined herein, or who does, or attempts to do, anything whatever to avoid a full disclosure of the amount of business done, or to avoid the payment of the whole or any part of the tax or penalties due, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding One Thousand ($1,000.00) Dollars, and in case the offender is an individual, he may be imprisoned in the county jail not exceeding six months, or both so fined and imprisoned. Such penalty shall be in addition to the penalty imposed in Section 5 of this act.

"§ 8. It shall be the duty of the State Tax Commission to administer and enforce the provisions of this act, and it is hereby authorized and empowered to prescribe all blanks, forms and reports necessary to carry out the provisions of this act, and all costs and expenses incurred by the State Tax Commission in the administration of this act shall be paid out of the funds collected hereunder.

"§ 9. All taxes collected under the provisions of this act shall be paid to the Auditor of Public Accounts, and of [fol. 17] such amounts so received by the Auditor in any fiscal year, one-half part shall be set aside and credited to the Board of Charities and Corrections for the specific purpose of repairing, maintaining and constructing permanent improvements for the use of the institutions under the control of said board. The remainder of the amounts so collected and received by the Auditor in any fiscal year shall be credited to a fund to be used for the specific purpose of liquidating any indebtedness of the Commonwealth.

"§ 10. No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein

imposed upon any ground whatever, but the aggrieved taxpayer shall pay the tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon, from the date of payment. If it is finally determined that said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed.

"§ 11. The provisions of this act are severable and if any of its provisions or any penalty provided by this act shall be held unconstitutional, such provision or the par- [fol. 18] ticular penalty held to be invalid may be rejected without affecting the remainder of the act or such part of the penalties as are not held to be invalid and the decisions of the courts shall not affect or impair the remaining provisions of this act or any of the other penalties anywhere in this act provided. It is hereby declared as a legislative intent that this act would have been adopted had such unconstitutional provisions or such invalid penalties not been included therein.

"§ 12. All laws and parts of laws in conflict herewith are hereby repealed to the extent of such conflict.

"§ 13. Whereas, the present state revenue does not meet the immediate needs for the maintenance and development of the State government and its agencies, an emergency is declared to exist, and this act shall become a law and be effective upon its passage and approval by the Governor.

"Approved March 17, 1930."

VII

The firm or partnership of which these plaintiffs are members has continuously conducted, under the same firm

name, the same general character of retail business for almost seventy years past, with varying changes of its members (due to death), including successively three generations of the same family. During all that time it has conducted its retail store in the same location, at Third and Market streets, in Louisville, Kentucky.

The business so conducted by said firm is that of retail merchants owning and operating a single retail store for the sale of—

[fol. 19] Men's and boys' clothing, Hats, Shoes and Furnishings,

with the addition in more recent years of—

Ladies' hosiery.

Plaintiffs conduct in their retail store what is known as a department store, embracing approximately 17 separate departments, in which they sell at retail merchandise of various kinds, of which the following are illustrations:

Men's Clothing,
Men's Clothing (Basement).
Boys' Clothing.
Boys' Clothing (Basement).
Men's Furnishings.
Men's Furnishings (Basement).
Men's Shoes.
Men's Shoes (Basement).
Boys' Shoes.
Men's Hats.
Men's Hats (Basement).
Boys' Hats.
Boys' Furnishings.
Trousers.
Ladies' Hose.
Children's Hose.
Toilet Goods.

Each of said departments is operated by plaintiffs separately from other departments, and plaintiffs' books and accounts are kept so as to show separately as to each department the sales therein, the expense of operation, including its proper proportion of rental, taxes, insurance and [fol. 20] all other overhead expense, and the net results of

such operation of each department, to the end that plaintiffs may determine, after allocating to each department its proper proportion of overhead general expense, including rental of floor space, taxes, insurance and all other proper overhead charges, the results of operation in each such department, and the wisdom or policy of maintaining or continuing the conduct of such department, or changes of policy or management necessary to make each department self-supporting if possible.

In the conduct of its general business, plaintiffs come into competition with a large number of other stores selling merchandise of a similar character in Louisville and in other cities in Kentucky, and the same is true as to each department operated by plaintiffs in their retail store inasmuch as each of said departments is compelled to and does actively compete with specialized stores or stores dealing in similar lines of goods in the city of Louisville and elsewhere in Kentucky. Such competition extends not only to the matter of buying power but also to the matter of selling and the fixing of prices on goods sold so as to make them sell in competition with other dealers in similar goods in Louisville or elsewhere in Kentucky, and such competition applies not only to the plaintiffs' conduct of its store as a whole but as to each unit or department therein.

[fol. 21] VIII

For many years past, plaintiffs have kept their capital invested in the retail store conducted by them in Louisville, Kentucky. In all that time, the partnership has been a large taxpayer to the State of Kentucky, the City of Louisville, and the County of Jefferson, paying all annual ad valorem taxes levied thereon by competent authority for State, County and City purposes. Their firm has exerted itself with the utmost diligence and prudence to build up its business as a retail merchant by all honorable means, and it has built up a large and valuable business in the face of the keenest competition with other retail merchants conducting a similar business, some of them with a larger volume of gross sales and others with a smaller volume of gross sales in the respective kinds or classes of merchandise sold by plaintiffs.

To do this has required of the plaintiffs the closest attention to every phase of their business, including the most

careful foresight as to the class or style of goods they should stock in their store and in each department thereof to attract the public and to satisfy its wishes and to stimulate purchases by it, and also the most effective methods of displaying and advertising its goods so as to attract buyers, as well as the most careful consideration as to prices to be placed thereon so as to stimulate sales and thus to obtain a turnover of its stock as rapidly as possible at all times, especially as to such articles as are seasonal in [fol. 22] character, thus avoiding the losses in business that inevitably result from carrying over old stock from one season to another, and at the same time giving to its buying public the benefit of attractive goods properly priced at the proper season for their sale and use.

In order to accomplish this result, plaintiffs have been obliged to expend each year, in the community served by them, large amounts of money for advertising in newspapers and for trade solicitation by personal letters to their customers, and circulars to the public generally, and have also expended large sums of money in the employment of skilled and competent persons to decorate their show-windows and make an inviting display of merchandise in their windows and in their store, and in the purchase of the proper equipment for such purposes. Only by such progressive methods and by the policy of continued fair dealing with the buying public, has their firm been able to build up its business and to take its own proper part in building up its city and State.

Likewise the plaintiffs have for many years past actively interested themselves in all forms of civic, cultural, religious and welfare work carried on in their city and State and contributed largely of their means and of the time of their members.

The plaintiff, Fred Levy, has been President of the National Association of Clothiers and Furnishers as well as of the Louisville Retail Merchants' Association and the Louisville Commercial Club, and of many other organiza- [fol. 23] tions engaged in civil, cultural, religious and welfare work, in addition to serving as a member of the Park Commission of the City of Louisville, in all of which capacities he has served without pay.

Likewise other members and employes of their firm have taken their part in public activities.

Plaintiffs' firm keeps its money on deposit in banks

located in Kentucky and makes purchases of goods produced in Kentucky when practicable to do so. It has more than 175 employes at all times, ranging as high as 225 employes during the rush seasons. It pays them the highest current compensation for services of the kind rendered by them. Nearly all of its employes have been with it continuously for more than five years. Most of them have been with it for periods ranging from 10 to 50 years. Many others are actually pensioned by it. Near the end of each calendar year it gives to various employes a bonus proportioned to services rendered. Every employe in its service for as much as a year gets a vacation of one week or more on full pay.

IX

In addition to the payment of its annual ad valorem taxes, plaintiffs have paid to the State of Kentucky for the calendar year 1930, automobile license taxes in the sum of $134.61. Plaintiffs' firm is not incorporated and it does not sell articles upon the sale of which any excise or license tax is levied by the State.

[fol. 24] X

There is absolutely nothing in the business conducted or property or merchandise kept in plaintiffs' retail store, or in plaintiffs' method of conducting or managing same, that is in any degree inimical to the public health, the public welfare, the public morals, or the public safety, or which to any extent whatever increases any fire or police hazard beyond whatever hazard may appertain to other stores handling a similar class of merchandise with one-twentieth the annual volume of gross sales made by plaintiff.

Moreover, Chapter 149, Acts of 1930, herein referred to, is purely a tax measure and it does not purport to be an exercise of the police power of the State. It does not relate to the public health or the public welfare, or the public morals or the public safety. It does not attempt to regulate any business that is affected with a public interest. No provision is made therein for regulation, supervision or inspection of any retail merchant upon whom or upon whose occupation it attempts to impose a tax. It is not an inspection measure in which fees are prescribed to cover the cost of inspection. No standards are set up for the conduct of the business of a retail merchant.

XI

[fol. 25] As a tax measure, the operation or effect of said Chapter 149, Acts of 1930, is not equal or uniform as applied to the retail merchants therein sought to be taxed, and, as hereinafter more specifically shown, the classification of retail merchants therein attempted to be made is deliberately and designedly so made as to be arbitrary, unreasonable, discriminatory, oppressive and prohibitory as to these plaintiffs and all other retail merchants who are thereunder sought to be taxed at rates in excess of one-twentieth of one per cent. upon their gross sales respectively, and moreover, in its higher brackets of taxation, confiscatory as to these plaintiffs and all others similarly situated.

XII

During the calendar year 1930, the total gross retail sales made by plaintiffs in all departments conducted by it in their retail store aggregated $1,554,151.52, of which amount, gross retail sales aggegating $1,253,389.07 were made between March 17, 1930 (the date of approval of said Act herein challenged), and December 31, 1930, both dates inclusive.

Applying to said gross sales, claimed by defendants to be subject to taxation under Chapter 149, Acts of 1930, the geometrically graduated rates of taxation prescribed by [fol. 26] said challenged Act, and deducting the credits allowed by Section 4 of said challenged Act, would produce the following result:

1/20 of 1% on first $400,000 of sales	$200.00 Tax
2/20 of 1% on next $100,000 of sales	100.00 Tax
5/20 of 1% on next $100,000 of sales	250.00 Tax
8/20 of 1% on next $100,000 of sales	400.00 Tax
11/20 of 1% on next $100,000 of sales	550.00 Tax
14/20 of 1% on next $100,000 of sales	700.00 Tax
17/20 of 1% on next $100,000 of sales	850.00 Tax
1% on excess over $1,000,000 of sales	2,533.89 Tax
Total tax above computed	$5,583.89
Credit for motor vehicle licenses	134.61
Net tax levied upon Plaintiff	$5,449.28

XIII

Each of the separate departments conducted by plaintiffs in their retail store comes into direct competition with a number of other specialized individual retail stores in Kentucky dealing mainly and often exclusively in the particular kind or class of goods handled and sold by plaintiffs in the particular department of their stores handling or selling that class or line of goods. In no one department conducted by plaintiffs in their retail store (except Men's Clothing in which the gross annual sales are approximately $600,000.00) do the gross sales in any calendar year or for the period beginning March 17, 1930, and ending December 31, 1930, amount to as much as $400,000, nor do the gross annual sales of any specialized retail store in Kentucky competing [fol. 27] with any of the departments in plaintiffs' store, or its gross sales for the period beginning March 17, 1930, and ending December 31, 1930, exceed in any case the sum of $700,000, and practically all of them have gross annual sales not exceeding $400,000.00 in amount.

It thus results that the challenged Act of 1930, hereinabove set out, designedly, by its terms, works a discrimination against plaintiffs and denies to them the equal protection of the law, and imposes upon them a grossly unequal, oppressive, arbitrary and discriminatory burden of taxation in that the specialized single stores competing with any one department of plaintiffs are in nearly every case, if not in every case, taxed under said Act in the lowest bracket at 1/20 of one per cent of gross sales, subject to the credits provided by Section 4 of said Act, while, on the other hand, the gross sales of plaintiffs' department competing with said specialized single store are added to their gross sales in all other departments so as to produce an aggregate of gross sales during the taxable period, to be taxed at the highest brackets or rates of taxation provided in said Act, to-wit, at the rate of one per cent, which is 20 times in excess of the rate that in practically every case is levied under said Act upon the specialized single store competing with one of plaintiffs' departments in their retail store.

[fol. 28] XIV

Moreover, said challenged Act of 1930 contains in Section 4 thereof a provision which in effect entirely exempts from the payment of any tax thereunder all smaller retail merchants having gross sales for the taxable period under said Act comparable in amount with sales made by plaintiffs in the several separate departments of their retail store actually competing with said retail merchants with the smaller volume of gross sales.

Section 4 of said challenged Act provides, in substance and effect, that while the license tax created and imposed by said Act shall not be in lieu of any special State license, excise, occupational or corporation license tax due under the provisions of any law now in force or that may hereafter be enacted, yet in the case of the retail merchants having smaller volumes of sales, such credits are in actual fact provided as in effect relieve said smaller retail merchants of the payment of any tax whatever under said challenged Act and in effect provide that the special State license, excise, occupational or corporation license tax exacted from them under laws now in force or hereafter enacted shall be a substitute for any license tax otherwise exacted of them under the challenged Act.

The credits allowed under Section 4 of said challenged Act, by way of remission of the tax levied thereunder, are sufficient in practically all cases to offset entirely the rela-[fol. 29] tively small tax levied under said Act on sales of retail merchants as defined therein, whose annual gross sales do not exceed $400,000, and they were known to be sufficient for that purpose at the time of the passage and approval of said Act, and the allowance of said credits by way of remission of the tax levied in the Act and the graduation of said tax were both provided for in said Act as an essential part of a legislative scheme to tax retail merchants having a large volume of gross annual sales and to exempt from taxation retail merchants having a small volume of gross annual sales.

There are very few retail merchants in Kentucky whose gross annual sales in a single or individually-owned store exceed $400,000, and the gross annual sales of practically all such retail merchants are far below $100,000, and in most instances far below $50,000.

In practical effect and operation, only those retail merchants doing business in Kentucky who own or manage more than one department in a single store, or more than two stores, with or without departments, and who have gross annual sales in all their stores or departments aggregating more than $400,000, are subject to taxation under said Act, in any appreciable amount and those who are taxed at all constitute a very small class of limited number as compared with the vast number of retail merchants who are wholly exempt from taxation under said Act. There is no just or reasonable basis for the classification of retail [fol. 30] merchants on the basis of taxing the limited class subject to taxation under said Act and exempting the overwhelmingly larger class not subject to taxation under said Act.

To illustrate: The average retail merchant conducting a general retail store in Kentucky has invested therein a capital not exceeding $25,000, and has gross annual sales aggregating less than $50,000, and such a retail merchant would, as a rule, pay to the State of Kentucky, upon the kind of stock carried in his general store, special State license or excise taxes aggregating from $10 to $15.

If such retail merchant conducts his business under form of a corporation organized in Kentucky, with an authorized capital stock of $25,000, fully paid in and invested in its single retail store in Kentucky, and has therein gross annual sales of $50,000, it could by no possibility be assessed under said challenged Act of 1930 with a tax exceeding $25, and as a matter of fact, in general practice it would not be assessed with any tax at all, or with a much smaller tax than $25, because its annual corporation license tax, levied under Sections 4189-1 and 4189-2, Kentucky Statutes, at the rate of 70 cents per $1,000 of authorized capital stock or capital invested in Kentucky, plus other State excise or license taxes paid by it, would largely if not completely offset any tax imposed upon it by said challenged Act, and would thus be a complete substitute for any tax so imposed upon it by said Act.

[fol. 31] On the other hand, exactly the same volume of annual gross sales made by plaintiffs in one of their departments in competition with said average retail merchant would be added to all the other gross annual sales made in all the other departments of plaintiffs' store and

thus subjected to a tax at the rate of one per cent as compared with a tax of 1/20 of one per cent levied by said Act upon the average retail merchant conducting an average general retail store and competing with plaintiffs in the sale at retail of goods of the same kind and character. Credits allowed to plaintiffs under Section 4 of said Act, when proportionately allocated to said department, would amount to a very significant part of the tax levied upon plaintiffs by reason of tneir annual gross sales in such department.

XV

Said challenged Act, by its terms and especially by Section 4 thereof, designedly makes or attempts to make a classification of retail merchants to be taxed thereunder, purely on the basis of whether such retail merchants are incorporated or unincorporated, and to allow to retail merchants that conduct their business in corporate form a credit upon any taxes otherwise levied upon or assessed against them under said Act for the amount of any annual corporation license tax levied upon them, pursuant to Sections 4189-1 and 4189-2, Kentucky Statutes, for the privilege enjoyed by them of conducting their business in cor-[fol. 32] porate form, while at the same time denying to the plaintiffs and other retail merchants similarly situated, who are not incorporated, any equal or corresponding credit upon the taxes levied upon or assessed against them by the terms of said challenged Act.

There are many hundreds of retail merchants conducting retail stores in Kentucky who are incorporated and thus entitled under Section 4 of said Act to a credit upon any license taxes imposed upon them by said Act, which credit in hundreds of cases amounts to a complete remission of all taxes levied upon them under said Act, and in many hundreds of other cases said credit amounts to a substantial remission of all taxes levied upon the incorporated retail merchant under said Act, when at the same time these plaintiffs and other retail merchants similarly situated, who are not incorporated, must under said Act pay the taxes thereby levied upon or assessed against them, without any equal or corresponding deduction.

Such classification of retail merchants as incorporated or unincorporated and such imposition upon them of dif-

ferent rates or methods of taxation, or such remission of taxes so levied, by the allowance of credits, based solely upon such classification, are and each of them is wholly unreasonable, arbitrary, capricious, unequal, unjust, oppressive and discriminatory against these plaintiffs and all other retail merchants similarly situated, who do not con- [fol. 33] duct their business in corporate form, and said challenged Act in such respects denies to these plaintiffs and to other retail merchants similarly situated the equal protection of the law which is guaranteed to them by the Fourteenth Amendment to the Constitution of the United States, the benefits of which, and of all rights given to them thereunder, are hereby specially set up and claimed by these plaintiffs on behalf of themselves and all others similarly situated.

By reason of the facts set forth in this clause and in other clauses of this bill, said challenged Act is wholly unconstitutional, null and void, under the principles of law argued by counsel and expounded by the Supreme Court of the United States in Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389, and similar cases.

XVI

Section 1 of said Act provides that it shall be construed to apply to "every retail merchant" and "store" as defined therein, which is controlled or held with others by majority of stock ownership or ultimately controlled or directed by one management or association of ultimate management.

The design, intent, practical operation and effect of said provision is to require and compel the owner or management of two or more separate and distinct stores and/or departments as defined in said Act, to aggregate for the purposes of taxation the gross sales of all stores and/or [fol. 34] departments controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management without regard to the fact that said stores and/or departments may be separate and distinct enterprises; without regard to their location and without regard to the fact that said stores, and/or departments, are each engaged in the sale at retail of wholly different merchandise

and commodities unrelated to the merchandise and commodities sold in other stores, and/or departments.

The design, intent and practical operation of said Act is thereby to tax, penalize and, because of the increased rate of taxation in the higher brackets, to prohibit the employment of capital in the acquisition of stock in corporations owning stores, as defined by said Act, which may result in majority stock ownership, and to tax, penalize and in effect prohibit the employment of capital, skill, efficiency and economy in the operation of such stores under one management or co-operatively under an association of management.

XVII

For many years past there have been various voluntary co-operative associations or agencies organized and successfully conducted for the purpose of affording to so-called individual or single-store retail merchants engaged in Ken- [fol. 35] tucky and elsewhere in the business of selling at retail, goods, wares and merchandise of the character handled and sold by plaintiffs in their retail store and by retail merchants generally throughout Kentucky and other States, facilities, services and advice in selecting, buying, advertising and displaying the merchandise handled or sold by them at retail in their respective stores in Kentucky and elsewhere corresponding in all material respects as to price, quality or kind with the merchandise handled or sold by plaintiffs in their retail store and by other retail merchants similarly situated.

These co-operative associations or agencies, for a comparatively small fee, afford to retail merchants operating individual specialized stores throughout Kentucky and elsewhere, affiliated with them, all the facilities and advantages, in the matter of selection of goods and prices to be paid therefor, that can be obtained by any large organization operating on its own account, and in many cases such co-operative associations or agencies afford to their members or patrons very much better advantages and facilities along such lines.

Likewise such co-operative associations or agencies afford to many retail merchants in Kentucky and elsewhere, affiliated with them, the benefit of their advice and experience and co-operative action in securing increased

results in advertising the goods of such retail merchants to the buying public, as well as advice and suggestions as [fol. 36] to the most approved and advanced method of selecting goods of the proper style and quality, and for displaying such goods in the retail stores of the various retail merchants affiliated with such co-operative associations or agencies.

Practically all retail merchants owning or operating in Kentucky specialized individual retail stores, who have gross annual sales aggregating as much as $100,000, for some years past, as a part of the economic development of the business of a retail merchant, have availed themselves of the services and facilities thus afforded by said co-operative associations or agencies. In this manner, such retail merchants have as great buying power as the plaintiffs or any other retail merchant buying on his or its own account a stock of merchandise for sale in his or its retail store or stores, and they can buy goods of as high class and quality, at similar price, as the plaintiffs or any other retail merchant similarly situated, and they can and do get the benefit of the same facilities and services for advertising, displaying and handling their merchandise in their respective stores, and for effecting a rapid turnover thereof, even though the aggregate of their gross sales may be, and in practically every case it is, less than $400,000 per annum in any retail store or stores owned or operated by them in Kentucky.

Hence plaintiffs, by reason of their operation of a larger store and the larger volume of gross sales made by it therein, have no advantage whatever over the retail mer- [fol. 37] chant operating a specialized individual store in competition with the store of these plaintiffs or any department therein. On the contrary, many of said specialized individual stores have gross annual sales of merchandise handled by them substantially exceeding in volume the gross annual sales of such merchandise handled and sold in the department of plaintiffs' store competing with such specialized individual retail merchant.

In addition thereto, the specialized individual merchant has the advantage of better facilities for displaying his merchandise, of whatever character it may be, in a smaller store located directly on the ground floor with display win-

dows facing directly upon the street upon which his retail store is located. As a matter of fact, many of said specialized individual retail stores competing with the plaintiffs have, by reason of their advantages, made substantial inroads and encroachments upon the trade of plaintiffs in their various departments established and conducted for many years prior to the opening or establishment of such specialized individual stores now operating in competition with plaintiffs.

Accordingly, there is no just, proper or reasonable basis whatever for discrimination in the matter of taxation against these plaintiffs and in favor of the retail merchant conducting a specialized individual store.

[fol. 38] XVIII

The classification made, as a basis for the tax imposed by said challenged Act, rests wholly upon gross retail sales and the percentage of said tax is increased with each one hundred thousand dollars of sales above $400,000.00, unequally, disproportionately, arbitrarily, and with the sole design and intent to burden, oppress, prohibit and discriminate against the ownership or ultimate management of a retail store in Kentucky having a large volume of gross sales (whether in one store or more or in one department or more in the same store), and thus unreasonably, unequally and disproportionately to discriminate against, oppress, burden and penalize the employment of capital, skill, efficiency and the ability of retail merchants in the State of Kentucky to increase their sales above four hundred thousand dollars. The rate of tax is one-twentieth of one per cent on the first four hundred thousand dollars of gross sales. The rate of tax is doubled for the next one hundred thousand dollars of sales. The rate of tax is five times as great for the next one hundred thousand dollars of sales; eight times as great for the next one hundred thousand dollars; eleven times as great for the next one hundred thousand dollars; fourteen times as great for the next one hundred thousand dollars; seventeen times as great for the next one hundred thousand dollars; and twenty times as great for all sales in excess of one million dollars. The [fol. 39] practical operation and effect of said unequal and disproportionate increase in the percentage of tax per one

hundred thousand dollars of increased sales is that a retail merchant who increases his sales one hundred thousand dollars above four hundred thousand dollars pays as much tax on said one hundred thousand dollars as a retail merchant whose sales are two hundred thousand dollars. For the next one hundred thousand dollar increase, said merchant is required to pay an additional Two Hundred and Fifty Dollars; for the next one hundred thousand dollars increase, an additional four hundred dollars, or a greater tax on said one hundred thousand dollars of increased sales than the entire tax of a retail merchant whose total sales are five hundred thousand dollars; for the next one hundred thousand dollars of sales, five hundred and fifty dollars, which tax on said one hundred thousand dollars of sales is as great as the total tax of a retail merchant having total sales of six hundred thousand dollars; for the next one hundred thousand dollars of sales the tax is seven hundred dollars; for the next one hundred thousand dollars of sales the tax is eight hundred and fifty dollars; for the next one hundred thousand dollars of sales and for every one hundred thousand dollars of sales thereafter, a tax is assessed of One Thousand Dollars, which is a greater tax per one hundred thousand dollars of sales than the total tax required of a merchant whose total sales are seven hundred thousand dollars. Under said Act, a [fol. 40] retail merchant having gross sales in any amount not exceeding three hundred thousand dollars, who increases said sales by one hundred thousand dollars, is only liable to a maximum increase in taxation of $50.00, less his permitted credits, whereas, the plaintiff is subject to a tax of $1,000.00 on every one hundred thousand dollar increase in its sales. Said classification is unreasonable, unequal, discriminatory, oppressive, arbitrary and confiscatory as to this plaintiff and other retail merchants similarly situated.

XIX

The classification and graduation made as a basis for the tax imposed rests wholly upon the amount of gross retail sales of all stores controlled or held with others by majority stock ownership, or controlled or directed by one management or association of ultimate management. Said classification does not rest in any particular upon the abil-

ity of the taxpayer to pay said tax. It does not rest in any particular upon the income or earnings from any store or stores. It has no necessary relation to receipts. It is imposed regardless of whether said sales are made at a profit or loss or the amount of profit or loss therefrom. It has no relation to profits or losses, if any accrue from said sales. It has no relation whatsoever to the capital employed or invested. It does not take into account the type of business. Said Act does not make any provision for the [fol. 41] merchandise returned, for the cancellation of sales or resales of merchandise or the net amount of sales, or sales on credits for which payment is not received, but classifies sales solely as to the gross amount thereof by dollars, and strikes at the increase in said gross sales by a geometrical increase in the rate of taxation, as heretofore set forth, per one hundred thousand dollars of increased sales up to one million dollars, after which the increase of gross sales above one million dollars, and the tax thereon is levied and collected at the highest bracket of one per cent.

Although said Act purports to classify and tax sales by dollars, it taxes the dollar of sales of certain retail merchants upon a rate and basis materially and substantially different from the dollar of sales of other merchants engaged in direct competition and similarly circumstanced, and imposes upon a merchant having gross sales of eight hundred thousand dollars, a tax of fifteen hundred dollars, or seven and one-half times the tax imposed upon his competitor who does exactly one-half the volume, to-wit, four hundred thousand dollars, who is only subject to a tax of two hundred dollars.

Thereby, one retail merchant doing exactly twice the business of his competitor is required to pay seven and one-half times as much tax on his dollar of sales as his competitor, who, in the same class and similarly circumstanced, is required to pay on his dollar of sales. Said classification is unreasonable, without a rational basis, and is arbitrary, [fol. 42] unequal, burdensome and oppressive.

XX

Such competitive stores, by reason of connection with co-operative associations, agencies or organizations, although singly or individually owned, enjoy any and all the advantages which may flow from group or co-operative buy-

ing on a large scale, the pooling of purchasing power, the ability to contract for buying their goods upon a large scale, and for the scientific and efficient arrangement of stores, window displays and the development of merchandising methods through the employment, co-operatively, of experts and others experienced therein. Said co-operative associations combine co-operatively as great or a greater number of stores and have as great or greater purchasing and buying power and have as great or greater advertising and merchandising ability as the plaintiffs and as those retail merchants who own two or more stores in the Commonwealth of Kentucky, or conduct two or more departments in any retail store so owned or operated by them. However, said singly or individually owned stores and members of co-operative associations, as aforesaid, although similarly circumstanced and in direct competition with the plaintiffs and with other retail merchants owning two or more stores, are not required to aggregate or combine for the purpose of [fol. 43] taxation or to report for taxation the total sales of all stores in Kentucky joined together in the same co-operative association or organization, and hence, said competitive stores, members of said associations or organizations, are not subject to taxation on the same basis, classification or rate as the plaintiffs, but in practical operation and effect are practically exempt from any taxation under said Act, whereas, the plaintiffs are subject to taxation at the highest rate prescribed in the said Act. By reason thereof, such competitive stores are given undue and unfair economic advantages over the retail store of the plaintiffs and other retail merchants similarly situated and are in effect aided, helped and subsidized by said Act in their competition with the plaintiffs and other retail merchants similarly situated.

XXI

The efficient and successful method of conducting retail business in the Commonwealth of Kentucky and elsewhere in the United States, at the present time, is to sell merchandise at the lowest possible price, consistent with a small percentage of profit on each individual sale, endeavoring thereby to increase the volume of sales and to secure a more rapid turnover of merchandise and capital. The retail merchant is required by reason of small percentage of profit on a single

sale to have a large volume of sales and continuously to [fol. 44] increase his sales volume in order to secure a fair return on the capital employed by him in his business. The highly competitive character of the retail business, in which plaintiffs are engaged, and other retail business in the Commonwealth of Kentucky and elsewhere in the United States, makes it necessary for each merchant to meet such competition and to conform his business methods therewith. In conformity therewith the plaintiffs and other retail merchants similarly situated have built up and developed in Kentucky for themselves respectively a large and valuable business, upon the basis of selling merchandise at retail to the public, at the lowest possible prices, consistent with a small average profit in individual sales. The plaintiffs and all other retail merchants similarly situated are dependent upon a large volume of sales in order to secure a fair, reasonable and adequate return upon invested capital employed in the conduct of their business. Such merchandising methods are the basis of the business of the plaintiffs and all other retail merchants similarly situated, are of benefit to the general public of the Commonwealth of Kentucky and have brought to the plaintiffs and all other retail merchants similarly situated a large and valuable good will and a large sales volume.

[fol. 45] XXII

The unfair, unjust, unequal, oppressive and discriminatory rates of taxation exacted by said challenged Act, of plaintiffs and all other retail merchants similarly situated, not only imposes upon them an unjust and intolerable burden for the benefit of other retail merchants engaged in like business but having a smaller volume of annual gross sales, but will inevitably destroy or impair, and the purpose of said challenged Act is to destroy or impair, the good will and established trade or business and thereby to reduce the volume of annual gross sales made by plaintiffs and other retail merchants similarly situated and, as far as possible under said Act, to divert trade and custom from the retail stores of plaintiffs and other retail merchants similarly situated and taxed in the higher brackets of taxation, to the more numerous but less progressive and enterprising retail merchants who have very much smaller annual gross sales and therefore, if taxed under said Act at all, are taxed

at rates very much lower than those exacted by said Act of plaintiffs and other retail merchants similarly situated.

Said challenged Act, in its purpose and effect, is wholly lacking in unformity in its application to the persons or occupations taxed thereunder, and it designedly transfers to and imposes upon plaintiffs and all other retail merchants similarly situated an undue proportion and prac- [fol. 46] tically the entire burden of the license taxes attempted in said challenged Act to be levied upon retail merchants.

Thus said challenged Act designedly discriminates in favor of retail merchants having a small or comparatively small volume of annual gross sales, and in effect levies a subsidy for their benefit to be paid wholly by plaintiffs and other retail merchants similarly situated, who have annual gross sales in larger volume. In so doing, said challenged Act denies to plaintiffs and other retail merchants similarly situated the equal protection of the law guaranteed to it and to them by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and also by the fundamental law of the State of Kentucky.

XXIII

There is a large number of retail merchants lawfully engaged in Kentucky in the operation of one store, either with or without separate departments therein such as plaintiffs conduct in their retail store, or in the operation of two or more stores, either under the same management or controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management, which are in like situation with plaintiffs in that, under said challenged Act, each of them is subject to taxation in the higher brackets at the [fol. 47] excessive, unjust and discriminatory rates of taxation therein levied upon them by reason of the larger volume of gross annual sales made by them, to the exclusion of an overwhelmingly large number of retail merchants competing with them respectively, who have very much smaller gross annual sales and, by reason of credits allowed under Section 4 of said Act, are required under said Act to pay no tax whatever or a wholly insignificant amount of taxes.

The retail merchants conducting stores in Kentucky who are thus situated similarly to the plaintiffs are entirely too

numerous to be joined in this suit as parties plaintiff, and the matters and things complained of in this bill and the questions herein raised as to the legality of the tax complained of, are all questions of common or general interest to many persons, as hereinbefore set forth, constituting a class so numerous as to make it impracticable to bring them all before the Court herein, and plaintiffs bring this suit on their own behalf and on behalf of all other individuals, firms, associations, copartnerships and corporations hereinbefore mentioned, for the purpose of enjoining the defendants from enforcing or attempting to enforce said challenged Act against plaintiffs or any of the other retail merchants similarly situated, on whose behalf this suit is brought, or from attempting to collect any tax under said Act against plaintiffs or any of said other retail merchants on whose behalf this suit is brought.

[fol. 48] While it is impracticable to bring them all before the Court, plaintiffs name herein some of the other retail merchants similarly situated and belonging to the class of retail merchants doing business in Kentucky, on whose behalf plaintiffs bring this suit, as follows:

Rodes-Rapier Co.

Louis Appel Co.

XXIV

By Section 5 of said challenged Act, any retail merchant who fails to file the report and to pay the tax as required therein is subject to an added penalty of 20 per cent plus 6 per cent per annum interest, with a further additional penalty of 20 per cent if collected by proceedings in Court.

By Section 7 of said challenged Act, any retail merchant, or any officer, director, trustee, or agent, who fails, in whole or in part, to make the report or to pay the tax required under said Act, is declared to be guilty of a misdemeanor and upon conviction subject to a fine of $1,000 and/or imprisonment in the county jail not exceeding six months—all in addition to the penalties imposed by Section 5 of said Act.

[fol. 49]

XXV

Section 8 of said Act empowers the defendants, members of the State Tax Commission, to incur expenses and costs

for the enforcement and administration of said Act, to be paid out of the funds collected thereunder.

Plaintiffs state that the defendants are preparing for the administration and enforcement of said Act, and have already expended monies out of the State Treasury for the purpose of preparing blank forms and reports necessary to carry out the provisions of said Act, and unless enjoined and restrained by this Court, all of the defendants hereto will administer said law and expend funds raised by taxation in an amount in excess of Five Thousand ($5,000.00) Dollars for the enforcement thereof, and will require the plaintiffs and all other retail store owners not exempt under the provisions hereinbefore set forth, to pay the taxes prescribed by said Act, and upon the failure of said store owners, including the plaintiffs, to make said payments, the said defendants will attempt to enforce against them, including plaintiffs, the drastic penalties provided for by Sections 5 and 7 of said Act, and will attempt to enforce against them, including the plaintiffs, any other penalties or causes of action provided for by the statutes or General Laws of the Commonwealth of Kentucky, all to the irreparable injury and damage of plaintiffs and other retail merchants similarly situated.

[fol. 50] XXVI

By Section 55 of the Kentucky Constitution it is provided that no Act of the General Assembly shall become a law until 90 days after the adjournment of the session at which it was passed, except in cases of emergency, and the reasons for such emergency must be set out at length in the Journal of each House.

Section 13 of the challenged Act sets forth an alleged emergency as the basis for making said Act effective immediately upon its passage and its approval by the Governor, which took place on March 17, 1930. It contains the only assignment of any reason for an emergency justifying the enactment of Section 13 that is set out at length or at all in said Act or in the Journal of either House of the General Assembly.

Section 13, being the emergency clause of said Act, is void in that the so-called emergency therein recited has no connection with or relation to the purposes for which said

challenged Act was enacted by the General Assembly, and under the decision of the Kentucky Court of Appeals in McIntyre v. Commonwealth, 221 Kentucky, 16, and other decisions by the same Court, no reason whatever, meeting the requirements of Section 55, Kentucky Constitution, has been assigned for making said Act take effect upon its approval by the Governor on March 17, 1930, instead of according to the constitutional method and time prescribed by Section 55, under which said Act could not and did not [fol. 51] become effective prior to June 17, 1930.

The reasons for the emergency assigned in Section 13 deal solely with the inadequacy of the present State revenue to meet the immediate needs for the maintenance and development of the State Government and its agencies. The taxes to be levied and collected under said Act are to be levied and collected, one-half for the purpose of liquidating the indebtedness of the Commonwealth of Kentucky, and the other one-half is to be levied and collected for the specific purpose of repairing, maintaining and constructing permanent improvements for the use of institutions under the control of the State Board of Charities and Corrections.

Neither of these purposes is related to or connected with the maintenance or development of the State Government or its agencies which are referred to in Section 13 of said Act as the reason for the alleged emergency therein declared.

Plaintiffs say that in no event, under Section 55 of the Kentucky Constitution, could said challenged Act become effective prior to June 17, 1930.

XXVII

Plaintiffs say that said Act, in the various particulars hereinbefore pointed out, is void because it violates the provisions of the Constitution of the United States and of the Fourteenth Amendment thereof, and because it violates [fol. 52] the provisions of the Constitution of Kentucky as herein set forth, and plaintiffs now specially set up and claim herein the rights, benefits, privileges, immunities and exemptions secured to them by said provisions of the Fourteenth Amendment to the Constitution of the United States and by said Constitution of the Commonwealth of Ken-

tucky hereinbefore set forth and especially in the following particulars:

(1) Said Act, for the reasons hereinbefore set forth, is void in the several particulars and respects hereinbefore pointed out.

(a) It denies to plaintiffs and all other retail merchants similarly situated, due process of law, and is an attempt to levy upon them a tax that is confiscatory of their property, and moreover is an attempt to take their property without due process of law, as an arbitrary exaction, particularly insofar as any tax levied thereunder is measured by gross sales of retail merchants made prior to June 17, 1930.

(b) It denies to plaintiffs and other retail merchants similarly situated, the equal protection of the laws in that it exacts of the plaintiffs and other retail merchants similarly situated, an unreasonable, unjust, discriminatory, oppressive and prohibitive rate of taxation, based upon a classification that is unreasonable, unjust and discriminatory against the plaintiffs and all other retail merchants similarly situated, and in that it taxes plaintiffs and other retail merchants similarly situated, at geometrically increased rates, graduated according to increased volume of gross sales, without reference to any other consideration whatever and without any reasonable basis of classifica-[fol. 53] tion, and at the same time imposes upon other retail merchants, doing the same kind of business in substantially the same way, a very much lower rate and burden of taxation, and, as to an overwhelming number of such retail merchants, wholly exempts them from any taxation whatever under said Act and also in that it allows to retail merchants doing business in corporate form, a remission, in whole or in part, of taxes levied under said Act, or a credit thereon, when no such remission or like or corresponding credit is allowed to plaintiffs or to other retail merchants who are not incorporated.

(c) For the reasons hereinbefore set forth, said Act abridges the privileges and immunities guaranteed to plaintiffs by the said Fourteenth Amendment, in the particulars hereinbefore set forth, and is therefore illegal and void.

(2) Said Act violates the fundamental principles of uniformity in the matter of taxes levied upon occupations, persons or property upon some reasonable basis of classification as such principles of uniformity are recognized by Sections 171 and 181 of the Constitution of the Commonwealth of Kentucky.

XXVIII

Section 10 of said Act contains provisions designed to deny to plaintiffs and other retail merchants attempted to be taxed under said Act, any remedy whatever in advance of the payment of said tax, and likewise to deny any remedy whatever, after the payment of the tax imposed thereunder, except that where the tax is paid under protest, the tax-[fol. 54] payer may, within two years after such payment, bring in a court of competent jurisdiction in the Commonwealth of Kentucky an action for mandamus against the Auditor of Public Accounts to compel him to draw his warrant upon the State Treasurer for the amount of such tax as may be adjudged to have been wrongfully collected from such taxpayer.

Such action could only be brought where the tax is paid under protest and after its payment, and could only be brought or prosecuted in the Courts of Kentucky, and a judgment therein in favor of the complaining taxpayer could only result in obtaining a warrant upon the General Fund of the State in the hands of the State Treasurer, to be paid if and when funds were available for the payment of such warrants in the usual and orderly course.

Plaintiffs say that the taxes collected under said Act do not go into the General Fund of the Commonwealth, but are immediately appropriated and applied as provided in said Act; that there are now outstanding many State warrants drawn by the Auditor of Public Accounts upon the General Fund in the hands of the State Treasurer which have been outstanding since June, 1927, and can not be collected by the owners or holders thereof, for lack of funds in the State treasury during such period, for the payment of such warrants.

Plaintiffs say that, as shown by a monthly financial statement officially issued by the State Treasurer of Kentucky as of January 1, 1931, the amount of money in the General

[fol. 55] Fund on January 1, 1931, less minor accounts, was $12,565.81 as against which there were at the time outstanding warrants aggregating $9,880,502.76 drawn by the Auditor of Public Accounts upon the State Treasurer and presented for payment but not paid for lack of funds.

By reason of the facts herein set forth, the plaintiffs have no remedy whatever in the State Courts of Kentucky, and no remedy whatever at law in the courts of the United States.

XXIX

Plaintiffs say that the defendants and each of them are threatening to, and unless enjoined or restrained by order of this Court they will, take steps, by prosecution of the plaintiffs and, through such prosecution, by the infliction of penalties of fines and/or imprisonment, provided by said challenged Act, to enforce against plaintiffs the severe penalties provided in said Act, and also to enforce the collection from these plaintiffs of said illegal tax, in the sum of $5,449.28 as hereinbefore computed and stated, and also to compel plaintiffs, under said void Act, to make reports to the State Tax Commission of Kentucky of all its gross sales as therein provided, and also will attempt to enforce against plaintiffs, by prosecution and the infliction of penalties provided in said void Act, the payment of an illegal tax upon the gross sales of these plaintiffs amounting *of* [fol. 56] $1,253,389.07, upon which, under said Act, a tax would result against these plaintiffs of $5,449.28 as hereinabove set out, and will also proceed to enforce the excessive penalties provided in said Act for failure of a taxpayer assessed thereunder to make prompt payment of the taxes assessed against him as provided therein, and in like manner and with like results will proceed against all other retail merchants similarly situated.

XXX

Unless the defendants, after notice and hearing, are enjoined and restrained from enforcing or attempting to enforce said Act, the plaintiffs and all others similarly situated, will sustain irreparable loss and injury for which they have no plain, adequate or complete remedy at law, or any remedy at all in the Courts of Kentucky, in each of the following particulars:

(1) The plaintiffs and all others similarly situated, will be compelled to pay taxes pursuant to an invalid and unconstitutional enactment, and for which they are not legally liable.

(2) Upon the failure of the plaintiffs, and others similarly situated, to pay said illegal taxes, the drastic penalties provided by said Act will be attempted to be enforced by the defendants against the plaintiffs' and others similarly situated, and as a result thereof, plaintiffs, and others simi- [fol. 57] larly situated, will be compelled to defend innumerable prosecutions brought to recover said taxes and penalties and criminal proceedings brought to impose the criminal penalties provided in Section 7, of said Act, all at great expense and damage to it and them.

(3) The defendants will expend public funds raised by taxation for the purpose of preparing to enforce and carry out the provisions of said Act to the irreparable injury and damage of the plaintiffs as taxpayers of the Commonwealth of Kentucky.

(4) If plaintiffs and others similarly situated should pay said taxes under protest and be compelled to commence actions to recover the same as provided in Section 10, of said Act, they would be put to large expense for attorneys' fees and court costs, and would be required to bring a multiplicity of actions in order to recover said monies, and said Act contains no provisions of any kind for the reimbursement to plaintiffs and others similarly situated, of said large sums which it would be required to expend in prosecuting such actions for attorneys' fees, expenses, court costs and other expenses.

(5) No waiver is provided of the right of the Commonwealth of Kentucky to defend any action brought in the courts of the United States as a suit against a State within the meaning of the Eleventh Amendment to the Constitution of the United States. In consequence whereof, the plaintiffs and others similarly situated, do not have a plain, [fol. 58] adequate and complete remedy in an action at law in the courts of the United States.

The only remedy afforded by said Act, or by any law of the Commonwealth of Kentucky, is a suit at law in the

Franklin Circuit Court against the Auditor of Public Accounts for a mandamus to compel him to draw his warrant upon the Treasurer for the amount of taxes erroneously exacted of the taxpayer and paid by him under protest, all of which appears from Section 10, of said challenged Act of 1930, and from Section 162, Kentucky Statutes, these being the only statutes of the State of Kentucky which afford any remedy in such cases to the taxpayer from whom illegal taxes have been collected by the State of Kentucky.

By no other statute has the Commonwealth of Kentucky ever consented in any way to be sued itself or through any of its officers for the recovery of taxes illegally exacted from a taxpayer and covered into the Treasury of the State.

(6) Said Act is ambiguous and doubtful as to its application and meaning, and as to the procedure and requirement thereunder, and has never been interpreted by the Court of Appeals of the Commonwealth of Kentucky.

(7) The amount of said annual tax which the plaintiffs would be required to pay under the terms of said Act will be a substantial portion of the capital invested by them in their retail store and needed by them to carry on their [fol. 59] business therein. The payment of so large a sum of money will impair the ability of the plaintiffs to operate their business in Kentucky and will possibly decrease the amount of annual business which they will be enabled to do, and will give competitors of the plaintiffs who are not required to withdraw any money from their respective businesses or who are not required to withdraw a proportionate sum therefrom, an unfair and undue advantage over the plaintiffs, for which the plaintiffs have no plain, adequate or complete remedy at law, and the same is true as to all other retail merchants similarly situated.

(8) The enforcement of said Act will have the effect of injuring and impairing all lawful business in which the plaintiffs and others similarly situated are engaged and in which they have the undoubted right to engage, and which right is guaranteed and protected by the State and Federal constitution-.

Prayer for Relief

Inasmuch, therefore, as the plaintiffs are without adequate remedy at law, and can obtain relief only in a Court of equity, the plaintiffs pray.

1. That writs of subpœna be issued to each of said defendants, requiring each of them to answer this complaint fully and truthfully, but not under oath, an answer under oath being hereby expressly waived as to each and all of said defendants.

[fol. 60] 2. That a temporary restraining order be issued, restraining the defendants and each of them, from enforcing said Act against the plaintiffs and all others similarly situated, under the provisions of said Act hereinbefore set out, and that each and all of said defendants and their successors in office be enjoined and restrained, after final hearing, from enforcing against the plaintiffs and all others similarly situated, the provisions of House Bill No. 111 of the General Assembly of Kentucky (Chapter 149, Acts of 1930, pages 475-482), directly or indirectly; from instituting or maintaining any actions at law or suits in equity to recover of or from the plaintiffs, and others similarly situated, the tax complained of, or for the recovery of any of the penalties prescribed in said tax for the nonpayment thereof; from expending any monies received by taxation or otherwise; from enforcing or preparing for the enforcement of said Act complained of, and from taking any steps looking to the exclusion of the plaintiffs and/or other persons similarly situated, from carrying on its and/or their business in the Commonwealth of Kentucky, and from taking any steps looking to the prosecution of the plaintiffs, its agents, servants or employees, or any person, firm or corporation similarly situated in the Commonwealth of Kentucky, and their agents, servants and employees for a violation of said Act, and from in any manner interfering with the carrying on and operation of such business in the Commonwealth of Kentucky.

[fols. 61 & 62] 3. That upon the final hearing of said cause, this Court will order, adjudge and decree that House Bill No. 111 of the General Assembly of Kentucky at a session of 1930 (Chapter 149, Acts of 1930, Pages 475 to 482, entitled: "An act relating to revenue and taxation, imposing an

excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act,'' be declared unconstitutional, null and void, as violating the Constitution of the United States and of the Commonwealth of Kentucky, in the particulars hereinbefore pointed out, and that the enforcement thereof be perpetually enjoined; and for all other and further and general relief, as may be just and equitable in the premises.

Nichols, Morrill, Wood, Marx & Ginter, Cincinnati, Ohio; Trabue, Doolan, Helm & Helm, Louisville, Ky., Solicitors for Plaintiffs.

[fol. 63] IN UNITED STATES DISTRICT COURT

ORDER PERMITTING PLAINTIFF TO SUE AS REPRESENTATIVE OF CLASS—January 24, 1931

On motion of plaintiff, based upon its verified petition herein, it appearing that the issues and questions raised in plaintiff's Bill of Complaint are of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the Court, it is now ordered, pursuant to Equity Rule 38, that plaintiff may sue on behalf of all other persons similarly situated, as well as on its own behalf, as to any issue or question presented by said Bill of Complaint that is of common or general interest to other taxpayers similarly situated, who are affected by said Chapter 149 of the Acts of 1930.

Chas. I. Dawson, Judge.

[fol. 64] IN UNITED STATES DISTRICT COURT

MOTION FOR TEMPORARY RESTRAINING ORDER—Filed January 24, 1931

The plaintiffs, Fred Levy et al., by counsel come and move the court, upon their verified Bill of Complaint herein showing that immediate and irreparable injury, loss or

damage will result to plaintiffs before notice upon defendants can be served and a hearing had upon their application this day made for an interlocutory injunction, to grant them a temporary restraining order, without notice, enjoining and restraining the defendants herein and each of them, pending the hearing and determination of plaintiffs' application for an interlocutory injunction upon notice as required by law for such interlocutory or preliminary injunction,

(1) From enforcing or executing, either directly or indirectly, against these plaintiffs and/or other taxpayers similarly situated, the provisions of Chapter 149 of the Acts of the General Assembly of Kentucky at its 1930 session, entitled:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; and declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act;"

on the ground that said Act is unconstitutional, null and void in that it denies to plaintiffs and other taxpayers similarly situated, rights, privileges and immunities guaranteed to plaintiffs and such other taxpayers by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and by the Constitution of Kentucky.

(2) From instituting or maintaining against these plaintiffs and/or other taxpayers similarly situated, any prose-
[fol. 65] cution or action at law, or any suit or suits in equity, to recover of or from the plaintiffs or other taxpayers similarly situated any portion of the alleged tax sought to be exacted of them under said Act, or for the infliction of any of the penalties prescribed in said Act for the nonpayment of such tax or for failure to make or file any reports or returns required thereunder.

(3) From further expending any moneys, received by taxation or otherwise, in the attempted enforcement of said

Act, and also from further enforcing or preparing for the enforcement of said Act, or from taking any steps looking to the prosecution of the plaintiffs or any of their agents or servants or employes, or any other person, firm or corporation similarly situated, or any of their agents or servants or employes, for a violation of said Act in any of its provisions.

Nichols, Morrill, Wood, Marx & Ginter; Trabue Doolan, Helm & Helm, Solicitors for Complainants.

[fol. 66] In United States District Court

Motion for Interlocutory Injunction—Filed January 24, 1931

The plaintiffs, Fred Levy et al., by counsel come and move the Court, upon their verified Bill of Complaint herein, for an interlocutory injunction, to be granted after notice as required by law, enjoining and restraining the defendants herein and each of them until further order of Court herein:

(1) From enforcing or executing, either directly or indirectly, against these plaintiffs and/or other taxpayers similarly situated, the provisions of Chapter 149 of the Acts of the General Assembly of Kentucky at its 1930 session, entitled:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act,"

on the ground that said Act is unconstitutional, null and void in that it denies to plaintiffs and other taxpayers similarly situated, rights, privileges and immunities guaranteed to these plaintiffs and such other taxpayers by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and by the Constitution of Kentucky.

(2) From instituting or maintaining against these plaintiffs and/or other taxpayers similarly situated, any prosecution or action at law, or any suits or suits in equity, to recover of or from the plaintiffs or other taxpayers similarly situated any portion of the alleged tax sought to be exacted of them under said Act, or for the infliction of any of the penalties prescribed in said Act for the non-payment [fol. 67] of such tax or for failure to make or file any reports or returns required thereunder.

(3) From further expending any moneys, received by taxation or otherwise, in the attempted enforcement of said Act, and also from further enforcing or preparing for the enforcement of said Act, or from taking any steps looking to the prosecution of the plaintiff or any of its agents or servants or employes, or any other person, firm or corporation similarly situated, or any of their agents or servants or employes, for a violation of said Act in any of its provisions.

Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Solicitors for Complainant.

[fol. 68] IN UNITED STATES DISTRICT COURT

ORDER GRANTING TEMPORARY RESTRAINING ORDER—January 24, 1931

This day came the plaintiffs, Levy Brothers by counsel, and upon their verified Bill of Complaint herein, entered their motion, without notice thereof to defendants or any of them, for a temporary restraining order pending the hearing of their application herein made for an interlocutory injunction because of immediate and irreparable injury, loss or damage shown by said verified Bill of Complaint to result to the plaintiffs before notice of such application for an interlocutory injunction can be served upon defendants and a hearing thereon had, inasmuch as

(1) It is impossible to convene a statutory court of three Judges as required by Section 266 of the Judicial Code as amended (U. S. Code, Title 28, Section 380) until after February 1, 1931, and

(2) Before such statutory court of three Judges can be convened to hear plaintiffs' application for an interlocutory injunction,

(a) The penalties prescribed by said Chapter 149 of the Acts of 1930 of the Commonwealth of Kentucky will have accrued, and plaintiffs and other taxpayers similarly situated, under said Act assailed herein as unconstitutional and void, will, on and after February 1, 1931, be subject to the fines and penalties in said Act prescribed for failure to make the reports or returns required of them under said Act, and will be subject to prosecutions and suits thereunder to recover the fines and penalties thereby imposed for failure to make such reports or returns, and

[fol. 69] (b) Any officer, director, trustee or agent of said plaintiffs and/or other taxpayers under said Act, similarly situated, will be subject to prosecution or to fine or imprisonment and other penalties denounced by said Act for failure to make such reports or returns, and otherwise will be without remedy for the protection of the constitutional rights of the plaintiffs and such other taxpayers similarly situated, or of any officer, director, trustee or agent of plaintiffs or such other taxpayers.

Thereupon the Court, being sufficiently advised, now finds that immediate and irreparable injury, loss or damage will result to plaintiffs and/or other taxpayers similarly situated, before notice upon defendants can be served and a hearing had upon said application for an interlocutory injunction, and therefore the Court now sustains said motion for a temporary restraining order without notice, and hereby grants to plaintiffs a temporary restraining order without notice, enjoining and restraining the defendants herein, and each of them, pending the hearing and determination of plaintiffs' application for an interlocutory injunction upon notice as required by law for such interlocutory or preliminary injunction,

(1) From enforcing or executing, either directly or indirectly, against these plaintiffs and/or other taxpayers similarly situated, the provisions of Chapter 149 of the Acts of the General Assembly of Kentucky at its 1930 session, entitled:

"An act relating to revenue and taxation, imposing an excise or license tax on retail merchants, as the words 'retail merchants' are used in this act; providing for the collection of such tax; the distribution and use of the revenue derived therefrom; the administration of said law, fixing fines and penalties for the violation of this act; declaring an emergency to exist, and repealing all laws in conflict with the provisions of this Act,"

[fol. 70] on the ground that said Act is unconstitutional, null and void in that it denies to plaintiffs and other taxpayers similarly situated, rights, privileges and immunities guaranteed to plaintiffs and such other taxpayers by the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and by the Constitution of Kentucky.

(2) From instituting or maintaining against these plaintiffs and/or other taxpayers similarly situated, any prosetion or action at law, or any suit or suits in equity, to recover of or from the plaintiffs or other taxpayers similarly situated any portion of the alleged tax sought to be exacted of them under said Act, or for the infliction of any of the penalties prescribed in said Act for the non-payment of such tax or for failure to make or file any reports or returns required thereunder.

(3) From further expending any moneys, received by taxation or otherwise, in the attempted enforcement of said Act, and also from further enforcing or preparing for the enforcement of said Act, or from taking any steps looking to the prosecution of the plaintiffs or any of their agents or servants or employes, or any other person, firm or corporation similarly situated, or any of their agents or servants or employes, for violation of said Act in any of its provisions.

The temporary restraining order herein granted shall expire in ten (10) days from this date unless, within the time so fixed, said temporary restraining order is extended for a like period, for good cause shown, the reasons for which extension shall be entered of record.

Before such temporary restraining order herein granted shall issue, the plaintiffs shall give bond with good security, to be approved by this Court or the Judge thereof, in

the penal sum of -2,500.00 conditioned upon the payment of such costs and damages as may be incurred or suffered by [fol. 71] the defendants or any of them who may be found to have been wrongfully enjoined or restrained thereby.

Chas. I. Dawson, Judge.

[fol. 72] IN UNITED STATES DISTRICT COURT

ORDER POSTPONING HEARING AND CONTINUING RESTRAINING ORDER—January 29, 1931

The above styled three cases having been set for hearing at Louisville on Monday, February 2, 1931, at ten o'clock A. M., upon application of the respective plaintiffs for an interlocutory injunction, and a restraining order in each case having been granted, to continue in effect until said date, and it now appearing that a statutory court of three Judges can not be convened for the hearing of said motions for a preliminary injunction before Saturday, February 7, 1931, at which time the case of Kroger Grocery & Baking Company vs. John B. Lewis et al., now pending in the United States District Court for the Eastern District of Kentucky, will come on for hearing upon a similar motion for injunction against the same defendants, wherein the validity of the same law is assailed, and the Judge of this Court has been requested by Honorable A. M. J. Cochran, Judge of the District Court for the Eastern District of Kentucky, to sit with him and with the Honorable A. C. Denison, United States Circuit Judge, in the hearing of said motion for an interlocutory injunction in the Kroger Grocery & Baking Company case,

Now come the defendants herein, by Honorable J. W. Cammack, Attorney-General of Kentucky, and Honorable S. H. Brown, Assistant Attorney-General, and enter their appearance herein, and by agreement between parties plaintiff and defendant in each of the above styled cases,

It is now ordered that the hearing of plaintiffs' motion for an interlocutory injunction in each of the above-styled three actions be now postponed from February 2, 1931, to February 7, 1931, and that the hearing thereof on February 7, 1931, shall be held at the Federal Court Hall in

Covington, Kentucky, simultaneously with the hearing of a similar motion in the case of Kroger Grocery & Baking Company against the same defendants, now pending in the Eastern District of Kentucky.

[fol. 73] By further agreement of parties, it is now ordered that the restraining order heretofore issued in each of the above-styled three cases be continued in effect beyond February 2, 1931, and until the motion for an injunction in each such case shall be heard and determined by the statutory court of three Judges to be convened for that purpose at the time and place above stated.

Chas. I. Dawson, Judge. Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Plaintiffs. J. W. Cammack, Attorney General; S. H. Brown, Assistant Attorney General, Solicitors for All Defendants.

[fol. 74] IN UNITED STATES DISTRICT COURT

MOTION TO STRIKE FROM BILL OF COMPLAINT—Filed February 14, 1931

Come now the defendants and move the Court to strike from the Bill of Complaint herein the following:

1. Beginning with the word "immediately" at line 12 from top of page 6, and on page 6, down to and including the figures "1930" on page 7 of the Bill of Complaint.

2. All of paragraph 5 on page 8 of the Bill of Complaint.

3. All of paragraph 8 on page 19 of the Bill of Complaint.

4. Beginning with the word "likewise", line 14 from top of page 21, on page 21, down to and including the word "pay" on page 22 of the Bill of Complaint.

5. Beginning with the words "said Act", line 10 from top of page 38, on page 38, down to and including the word "dollars" on line 15 from top of page 38, on page 38, of the Bill of Complaint.

6. All of paragraph 21, on pages 41 and 42 of the Bill of Complaint.

7. All of paragraph 26, on pages 47 and 48 and 49 of the Bill of Complaint.

8. All of paragraph 28, on pages 51 and 52 of the Bill of Complaint.

And, upon this motion, the defendants pray the judgment of the Court.

J. W. Cammack, S. H. Brown, Batson, Cary & Welch, Leslie W. Morris, Howard S. Gentry, Attorneys for Defendants.

[fol. 75] In United States District Court

Motion to Dismiss—Filed February 14, 1931.

Now comes the defendants, John B. Lewis, Seldon Glenn and H. M. Cline, members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Auditor of Public Accounts of the Commonwealth of Kentucky, and move the Court to dismiss the bill of complaint filed in the above entitled case upon the grounds and reasons therefore as follow-:

1. Because it appears in the bill of complaint filed in this case that this action is prosecuted by a citizen and resident of the State of Kentucky and that no diversity of citizenship exists between the parties hereto, and that the bill shows on its face that complainants are being deprived of no rights guaranteed them under the Constitution or laws of the United States.

2. That there is insufficiency of fact to constitute a valid cause of action in equity against these defendants.

3. Because it appears in the bill of complaint that plaintiffs have plain, adequate and complete remedy at law.

4. Because it appears in the bill of complaint that plaintiffs are, by the act under consideration, prohibited from maintaining any suit in equity to restrain the collection of the tax complained of.

J. W. Cammack, Attorney General; S. H. Brown, Assistant Attorney General; Howard S. Gentry, Solicitor for Defendants. Leslie W. Morris, Batson, Carey & Welch, of Counsel.

[fols. 76 & 77] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed Feb. 14, 1931.

Come now the defendants, John B. Lewis, Selden R. Glenn and Henry M. Cline, individually and as members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, and for answer to the Bill of Complaint filed in the above styled action plead as follows, to-wit:

I

For answer to paragraph 1 of plaintiffs' Bill of Complaint, defendants admit all the allegations therein.

[fol. 78] II

For answer to paragraph 2 of said Bill of Complaint, defendants deny that said Act is void for any reasons hereinafter set out, and admit all the other allegations contained in said paragraph.

III

For answer to paragraph 3 of said Bill of Complaint, defendants deny that this suit arises under the Constitution or laws of the United States, or that the amount in controversy herein exceeds the sum or value of $3,000, exclusive of interest and cost. They deny that this is a suit of a civil nature or that it is brought in equity for the purpose of enjoining the defendants or each of them from enforcing or attempting to enforce said Act of the General Assembly of Kentucky, Chapter 149 of the Session Acts of 1930, approved by the Governor of the Commonwealth on March 17, 1930, or that it is brought for the purpose of enjoining the defendants or any of them from requiring of the plaintiffs, or other taxpayers similarly situated, the reports which said Act purports to require of retail merchants as the term "retail merchant" is defined in said Act, or any information in reference to sales made by the plaintiffs, or any of said retail merchants similarly

situated, or from collecting or seeking to collect from the plaintiffs, or any of said retail merchants similarly situated, any tax purporting to be levied or assessed upon the plaintiffs, or any of said retail merchants similarly situated, to recover any of the penalties sought to be imposed by said Act upon the plaintiff or any of said retail merchants similarly situated, for violation of any of the terms of said Act.

IV

For answer to paragraph 4 of the said Bill of Complaint, defendants admit that House Bill 111 was passed [fol. 79] at the 1930 term of the General Assembly, but deny that it was introduced, read, signed, or enrolled under the title:

"H. B. 111. An Act to restrain the unfair competition of chain stores, and in aid of individual merchants in the Commonwealth."

And further deny that it was passed under any title except that shown by the enrolled bill in the Office of the Secretary of State, a certified copy of which bill is filed herewith.

V

For answer to paragraph 5 of said Bill of Complaint, defendants deny that said House Bill 111 was introduced into the House of Representatives in response to a recommendation made to the General Assembly by the Governor of Kentucky in his annual message of January, 1930, that legislation be enacted to curb the competition of so-called chain stores with owners of so-called independent unit stores individually owned or operated, or in aid of such individually owned or operated stores. They deny that while said House Bill 111 was pending before the House Committee to which it was referred upon its introduction, the case of Jackson v. State Board of Tax Commissioners of Indiana was decided on February 1, 1930, in which a measure similar in legal effect to said House Bill 111 as originally introduced was held violative of the Fourteenth Amendment to the Constitution of the United States, as shown by the opinion in that case.

They deny that both the nature and purpose of said House Bill 111 was not changed by amendment by the Committee to which it had been referred, or that the measure as so amended and passed in the manner set out and approved by the Governor was so framed as to contain any obnoxious or any unconstitutional features.

[fol. 80] VI

For answer to paragraph 6, defendants admit the allegations contained therein.

VII

For answer to paragraph 7, they deny that in the conduct of plaintiffs' store each of said departments is operated separately, or that plaintiffs' books or accounts are kept so as to show separately as to each department the sales therein, the expense of operation, its proper proportion of rental, taxes, insurance or all or other overhead expense, or the net results of such operation of each or any department, to the end that plaintiffs may determine after allocating to each department its proper proportion of overhead general expense, including rental of floor space, taxes, insurance or any or all other proper overhead charges, the result of operation in each or any such department, or the wisdom or policy of maintaining or continuing the conduct of such department, or changes of policy or management to make each or any department self supporting, or for any other reason.

They deny that in the conduct of its general business plaintiffs come into competition with a large or any number of other stores selling merchandise of a similar character in Louisville, or in other cities in Kentucky, or that the same is true as to each or any department operated by plaintiffs in their retail store, or that each or any of said departments is compelled to or does actively or at all compete with specialized stores or stores dealing in similar lines of goods in the city of Louisville or elsewhere in Kentucky. They deny that such competition exists or extends to the matter of buying power or to the matter of selling or to the fixing of prices on goods sold so as to make them sell in competition with other dealers in similar goods in [fol. 81] Louisville or elsewhere in Kentucky, or that such

or any competition applies to plaintiffs' conduct of its store as a whole or as to each unit or any unit or department therein.

VIII

For answer to paragraph 8, defendants deny that for many years last past or any years, plaintiffs have kept their capital invested in the retail store conducted by them in Louisville, Kentucky; deny that at any time the partnership has been a large taxpayer in the State of Kentucky, City of Louisville or County of Jefferson, paying all or any ad valorem taxes levied therein by competent authority for State, County or City purposes; deny that their firm has exerted itself with the utmost diligence or prudence, or at all, to build up its business as a retail merchant by all or any honorable means, or that it has built up a large or valuable business in the face of the keenest or any competition with other retail merchants conducting a similar business, or that some of them have a larger volume of gross sales, or others have a smaller volume of gross sales in the respective kind or class of merchandise sold by plaintiffs.

They deny that to do this has required of the plaintiffs the closest attention to every or any phase of their business, or careful foresight as to the class or style of goods they should stock in their store or in each department thereof to attract the public or to satisfy its wishes or to stimulate purchases by it, or the most effective methods of displaying or advertising its goods so as to attract buyers, or the most careful or any consideration as to prices to place thereon so as to stimulate sales or to obtain a turnover of its stock as rapidly as possible at all or any times, or as to such articles as are seasonal in character in order to avoid losses in business that result from carrying over old stock from one season to another, or otherwise, or at the same time giving to its buying public the benefit of at-[fol. 82] tractive goods properly priced or at the proper season for their sale or use.

Defendants deny that plaintiffs have been obliged to expend each or any year, in the community served by them, large or any amounts of money for advertising in newspapers or for trade solicitation by personal letters to their

customers, or circulars to the public generally, or have expended large or any sums of money in the employment of skilled or competent persons to decorate their show windows or to make an inviting display of merchandise in their windows or in their store, or in the purchase of the proper equipment for such purposes. They deny that by such methods or by the policy of continued fair dealing with the buying public, their firm has been able to build up its business or to take its own proper part in building up its City or State.

Defendants deny that plaintiffs have for many years or at all actively interested themselves in all or any forms of civic, cultural, religious or welfare work carried on in their City or State, or contributed largely or at all of their means or the time of their members.

They deny that plaintiff, Fred Levy, has been President of the National Association of Clothiers or Furnishers or of the Louisville Retail Merchants' Association or the Louisville Commercial Club, or of any other organizations engaged in civic, cultural, religious or welfare work, or that he has served as member of the Park Commission of the City of Louisville, or that in such capacity he has served without pay.

They deny that other members or employees of their firm have taken their part, or any part, in public activities.

Defendants deny that plaintiffs' firm keeps its money on deposit in banks located in Kentucky, or makes purchases of goods produced in Kentucky. They deny that the firm has more than one hundred and seventy-five employees at [fol. 83] all times or as high as two hundred and twenty-five during rush seasons, or that they have either of such number; deny that it pays them the highest current compensation for services of the kind rendered by them; deny that nearly all or any if its employees have been with it continuously for more than five years, or for any such time, or that most or many of them have been with it for a period ranging from ten to fifty years, or any such time; deny that any others are actually pensioned by it; deny that near the end of each calendar year or at all, it gives to any employees a bonus proportioned to services rendered; deny that any employee in its service for as much as a year gets a vacation of one week or more, or at all, on full or any pay.

IX

For answer to paragraph 9 of said Bill of Complaint, defendants say that they do not have sufficient information to answer the allegations contained in paragraph 9 of said Bill of Complaint, and therefore neither admit nor deny the same, but require strict proof thereof.

X

For answer to paragraph 10, defendants deny that there is nothing in the business conducted or property or merchandise kept in plaintiff's retail store, or in plaintiffs' method of conducting or managing same that is inimical to the public health, public welfare, public morals or the public safety, or which increases any fire or police hazard beyond whatever hazard may appertain to other stores having a similar class of merchandise with one-twentieth the annual volume of gross sales made by the plaintiff.

Defendants deny that Chapter 149, Acts 1930, is purely a tax measure or that it does not purport to be an exercise of the police powers of the State, or that it does not relate [fol. 84] to public health or public welfare or public morals or the public safety; deny that it does not attempt to regulate any business that is affected with public interest; deny that no provision is made therein for the regulation, supervision or inspection of any retail merchant upon whom or whose occupation it attempts to impose a tax.

XI

For answer to paragraph 11, defendants deny that as a tax measure, the operation or effect of said Chapter 149, Acts 1930, is not equal or uniform as applied to retail merchants therein sought to be taxed, or that the classification of retail merchants attempted to be made is deliberately or designedly so made as to be arbitrary, unreasonable, discriminatory, oppressive or prohibitory as to these plaintiffs or any other retail merchants who are thereunder sought to be taxed at rates in excess of one-twentieth of one per cent upon their gross sales respectively, or that in its higher brackets, or at all, said tax is confiscatory as to these plaintiffs or any others similarly situated.

XII

For answer to paragraph 12 of said Bill of Complaint, defendants say they do not have sufficient information to answer the allegations contained in paragraph 12 of said Bill of Complaint, and therefore neither admit nor deny the same, but require strict proof thereof.

XIII

Defendants deny that each or any of the separate departments conducted by plaintiffs in their retail store comes into direct competition with any specialized individual retail store in Kentucky dealing mainly or exclusively, or [fol. 85] at all, in the particular kind or class of goods handled or sold by plaintiffs in the particular department of their stores handling or selling that class or line of goods. They deny that in no one department conducted by plaintiffs do the gross sales in any calendar year or for the period beginning March 17, 1930, and ending December 31, 1930, amount to $400,000, or that the gross annual sales of any specialized retail store in Kentucky competing with any of the departments in plaintiffs' store, or its gross sales for the period beginning March 17, 1930, and ending December 31, 1930, exceeds in any case the sum of $700,000, or that practically all or any of them have gross annual sales not exceeding $400,000 in amount.

Defendants deny that said Act of 1930 designedly or at all, by its terms works a discrimination against plaintiffs or denies to them equal protection of the law, or imposes upon them an unequal, oppressive, arbitrary or discriminatory burden of taxation in that the specialized single stores competing with any one department are in any case, or in every case, taxed under said Act in the lowest bracket of one-twentieth of one per cent of gross sales, subject to the credits provided by Section 4 of said Act, or that on the other hand or at all the gross sales of plaintiffs' department competing with any specialized single store are added to their gross sales in all other departments so as to produce an aggregate of gross sales during the taxable period, to be taxed at the highest bracket or rates of taxation provided in said Act, to-wit, one per cent, or that said sum is twenty times in excess, or in any times in excess, of the rate

that in every case is levied upon the specialized single store competing with one of the plaintiffs' departments in their retail trade.

[fol. 86] XIV

For answer to paragraph 14, they deny that said challenged Act of 1930 contains in Section 4, or any part thereof, a provision which in effect entirely or otherwise exempts from the payment of any tax thereunder all or any smaller retail merchants having gross sales for the taxable period under said Act comparable in amount with sales made by plaintiffs in the several separate or any departments of their retail store actually competing with said retail merchants with the smaller volume of gross sales.

They deny that Section 4, or any part of said challenged Act, provides, in substance or otherwise, that while the license tax created or imposed by said Act shall not be in lieu of any special State license, excise, occupational or corporation license tax due under the provisions of any law now in force or that may hereafter be enacted, that in a case of retail merchants having a smaller volume of sales such credits are in actual fact provided as in effect, or otherwise, relieve said smaller retail merchants from the payment of any tax whatever under said challenged Act or in effect provide that the special State license, excise, occupational or corporation license tax exacted from them under laws now in force or hereafter enacted shall be a substitute for any license tax otherwise exacted from them under the challenged Act.

They deny that the credits allowed under Section 4 of said challenged Act, by way of remission of the tax levied thereunder are sufficient in any case to offset any tax levied under said Act on sales of retail merchants as defined therein, whose annual gross sales do not exceed $400,000, or that they were known to be sufficient for that purpose at the time of the passage and approval of said Act, or at any time, or that the allowance of such credits on the tax levied in the Act or the graduation of such tax were provided for in said Act as any part of a legislative scheme to tax retail [fol. 87] merchants having a large volume of gross annual sales, or to exempt from taxation retail merchants having a small volume of gross annual sales.

They deny that there are few retail merchants in Kentucky whose gross annual sales in a single or individually owned store exceeds $400,000, or that the gross annual sales of practically all or any such retail merchants are below $100,000, or in most or any instances below $50,000.

They deny that in practical effect or operation only retail merchants doing business in Kentucky who own or manage more than one department in a single store, or more than two stores, with or without departments, or who have gross annual sales in all of their stores or departments aggregating more than $400,000 are subject to taxation under said Act in an appreciable amount, or that those who are taxed at all constitute a small class of limited number as compared with the vast number of retail merchants, or that any retail merchants are wholly exempt under said Act. They deny that there is no just or reasonable basis for the classification of retail merchants on the basis of taxing the limited class subject to taxation under said Act, or that any class is exempt from taxation under said Act. They deny that the average retail merchant conducting a general retail store in Kentucky has invested therein a capital not exceeding $25,000, or has gross annual sales aggregating less than $50,000, or that such retail merchant would, as a rule, pay to the State of Kentucky, upon the kind of stock carried in his general store, special State license or excise tax aggregating from $10 to $15.

They deny that if such retail merchant conducts his business under form of a corporation organized in Kentucky with an authorized capital stock of $25,000, fully paid in and invested in its single retail store in Kentucky, or has a gross annual sales of $50,000, that it could by any pos- [fol. 88] sibility be assessed under said Act of 1930 with a tax exceeding $25; deny that as a matter of fact, in general practice it would not be assessed with any tax at all or with a smaller tax than $25, because its annual corporation license tax levied under Section 4189-1 and Section 4189-2, Kentucky Statutes, at the rate of 70c per $1,000 of authorized capital stock or capital invested in Kentucky, plus other State excise or license taxes paid by it, would largely or at all offset any tax imposed upon it by said Act or would thus be a substitute for any tax so imposed upon it by said Act.

They deny that on the other hand the same volume of annual gross sales made by plaintiffs in one of their departments in competition with said average retail merchant would be added to all or any of the other gross annual sales made in all or any of the other departments of plaintiffs' store, or would thus be subjected to a tax at the rate of one per cent as compared with a tax of one-twentieth of one per cent levied by said Act upon any retail merchant conducting an average general retail store or competing with plaintiffs in the sale, at retail, of goods of the same kind or character; deny that the credits allowed by plaintiffs under Section 4 of said Act, when proportionately allocated to said department, would amount to an insignificant part of the tax levied upon plaintiffs be reason of their annual gross sales in such department.

XV

For answer to paragraph 15, they deny that this Act, by its terms, or especially by Section 4, or any part thereof, designedly or at all makes or attempts to make a classification of retail merchants to be taxed thereunder on a basis of whether such retail merchants are incorporated or unincorporated, or to allow to retail merchants that conduct their business in corporate form a credit upon any taxes [fol. 89] otherwise levied upon or assessed against them under said Act for the amount of any annual corporation license tax levied upon them pursuant to Sections 4189-1 and 4189-2, Kentucky Statutes, for the privilege enjoyed by them of conducting their business in corporate form; deny that at the same time said Act denies to plaintiffs or other retail merchants similarly situated who are not incorporated, equal or corresponding credit upon the taxes levied or assessed against them by the terms of said Act.

They deny that there are many or any retail merchants conducting retail stores in Kentucky who are incorporated or thus entitled under Section 4 of said Act, or any part thereof, to a credit upon any license taxes imposed upon them by said Act, or that this credit in any case amounts to a complete or any remission of any taxes levied upon them under said Act, or that in any other case said credit amounts to a substantial remission of any taxes levied upon the incorporated retail merchant under said Act,

when at the same time these plaintiffs or other retail merchants similarly situated who are not incorporated, must pay the taxes thereby levied upon or assessed against them without equal or corresponding deduction.

They deny that such classification of retail merchants as incorporated or unincorporated or that such imposition upon them of different rates or methods of taxation, or such remission of taxes so levied, by the allowance of credits, is based upon such classification, or that any of them is unreasonable, arbitrary, capricious, unequal, unjust, oppressive or discriminatory against these plaintiffs or any other retail merchants similarly situated who do not conduct their business in corporate form, or that said Act in such respect denies to these plaintiffs or to other retail [fol. 90] merchants similarly situated the equal protection of the law which is guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

They deny that by reason of the facts set out in this clause, or in any other clause of this bill, said Act is unconstitutional, null or void.

XVI

For answer to paragraph 16, they deny that the design, intent, practical operation or effect of Section 1 of said Act is to require or compel the owner or management of two or more separate or distinct stores or departments, as defined in said Act, to ag-regate for the purpose of taxation, or otherwise, the gross sales of all stores or departments controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management without regard to the fact that said stores or departments may be separated or distinct enterprises, without regard to their location, or without regard to the fact that said stores or departments are each engaged in the sale at retail of wholly different merchandise or commodities unrelated to the merchandise or commodities sold in other stores or departments.

They deny that the design, intent or practical operation of said Act is thereby to tax, penalize or because of increased rate of taxation in the higher brackets, to prohibit employment of capital in the acquisition of stock in corporations owning stores, as defined by said Act, which

may result in majority stock ownership, or to tax, penalize or in effect prohibit the employment of capital, skill, efficiency or economy in the operation of said stores under one management or co-operatively under an association of management.

[fol. 91] XVII

For answer to paragraph 17, they deny that for many years past, or at all, there have been many or any voluntary co-operative associations or agencies organized or successfully conducted for the purpose of affording to so-called individual or single store retail merchants engaged in Kentucky or elsewhere, in the business of selling at retail goods, wares, merchandise of the character handled or sold by plaintiffs in their retail store or by retail merchants generally throughout Kentucky or other States, facilities, services or advice in selecting, buying, advertising or displaying the merchandise handled or sold by them at retail in their respective stores in Kentucky or elsewhere, corresponding in any material respect as to price, quality or kind with the merchandise handled or sold by plaintiffs in their retail store or by other retail merchants similarly situated.

They deny that these co-operative associations or agencies for any fee, afford to retail merchants operating individual specialized stores throughout Kentucky, or elsewhere, affiliated with them, any of the facilities or advantages in the matter of selection of goods or prices to be paid therefor, that can be obtained by any large organization operating on its own account, or that in any cases such co-operative associations or agencies afford to their members or patrons better advantages or facilities along such lines.

They deny that such co-operative associations or agenices afford to any retail merchants in Kentucky, or elsewhere, affiliated with them, the benefit of their advice or experience or co-operative action in securing increased results in the advertising of goods of such retail merchants to the buying public, or any advice or suggestions as to the most approved or advanced method of selecting goods of the proper style [fol. 92] or qaulity, or for displaying such goods in the retail stores of the various retail merchants affiliated with such co-operative associations or agencies.

They deny that many, or any, retail merchants owning or operating in Kentucky specialized individual retail stores,

who have gross annual sales aggregating as much as $100,000, for some years past, or at any time, as a part of the economic development of the business of a retail merchant, or otherwise, have availed themselves of the services or facilities thus afforded by said co-operative associations or agencies; deny that such retail merchants have as great buying power as plaintiffs or other retail merchant buying on his or its own account a stock of merchandise for sale in his or its retail store or stores, or that they can buy goods of as high class or quality, at similar price as plaintiffs or any other retail merchant similarly situated, or that they can or do get the benefit of the same facilities or services for advertising, displaying or handling their merchandise in their respective stores, or for effecting a rapid turnover thereof, even though the aggregate of their gross sales may be, or that in any case it is, less than $400,000 per annum in any retail store or stores owned or operated by them in Kentucky.

They deny that plaintiffs, by reason of their operation of a larger store or the larger volume of gross sales made by it therein, have no advantage over the retail merchant operating a specialized individual store in competition with the store of these plaintiffs or any department therein, or that on the contrary many of said specialized individual stores have gross annual sales of merchandise handled by them exceding in volume the gross annual sales of such merchandise handled or sold in the department of plaintiffs' store competing with such specialized retail merchant.

[fol. 93] They deny that the specialized individual merchant has advantage of better facilities for displaying his merchandise, of whatever character it may be, in a smaller store located directly on the ground floor with display windows facing directly upon the street upon which his retail store is located, or that any of said specialized individual retail stores competing with plaintiffs have, by reason of their advantage, or otherwise, made any inroads or encroachments on the trade of plaintiffs in their various departments established or conducted for many years prior to the establishment of such specialized individual stores now operating in competition with plaintiffs.

They deny that there is no just, proper or reasonable basis whatever for discrimination in the matter of taxation against these plaintiffs or in favor of the retail mer-

chant conducting a specialized individual store, or that there is any such discrimination.

XVIII

For answer to paragraph 18, defendants deny that the classification made as a basis of the tax imposed by said Act rests wholly, or at all, upon gross retail sales, or that the percentage of said tax is increased with each $100,000 of sales above $400,000, unequaully, disproportionately, arbitrarily or with design or intent to burden, oppress, prohibit or discriminate against the ownership of any retail store in Kentucky having a large volume of gross sales whether in one store or more or in one department or more in the same store, or unreasonably, unequally or disproportionately to discriminate against, oppress, burden or penalize the employment of capital, skill, efficiency or the ability of retail merchants in the State of Kentucky to increase their sales above $400,000. Defendants deny that the practical operation or effect of said increase in the [fol. 94] percentage of tax per $100,000 of increased sales is unequal or disproportionate, or that the effect of same is that a retail merchant who increases his sales $100,000 above $400,000 pays as much tax on said $100,000 as a retail merchant whose sales are $200,000, or that for the next $100,000 increase said merchant is required to pay an additional $250, or that for the next $100,000 increase an additional $400, or a greater tax on said $100,000 of increased sales than the entire tax of retail merchant whose total sales are $500,000, or that for the next $100,000 of sales $550, or that said tax on said $100,000 of sales is as great as the total tax of a retail merchant having total sales of $600,000, or that for the next $100,000 of sales the tax is $700, or that for the next $100,000 the tax is $850, or that for the next $100,000 of sales or for every $100,000 of sales thereafter, a tax is assessed of $1,000, or that same is a greater tax per $100,000 of sales than the total tax required of a merchant whose sales are $700,000. They deny that under said Act a retail merchant having gross sales not exceeding $300,000 who increases his said sales by $100,000 is only liable to a maximum increase in taxation of $50, less his permitted credits, or that the plaintiff is subject to a tax of $1,000 on every $100,000 increase in

sales; deny that said classification is unreasonable, unequal, discriminatory, oppressive, arbitrary or confiscatory as to this plaintiff or other retail merchants similarly situated.

XIX

For answer to paragraph 19, defendants deny that the classification or graduation made as a basis for the tax imposed rests upon the amount of gross retail sales of all stores controlled or held with others by majority stock ownership, or controlled or directed by one management or association of ultimate management; deny that said classification does not rest upon the ability of the taxpayer to pay said tax; that it does not rest upon the in- [fol. 95] come or earnings from any store or stores; that it *or* has no necessary relation to receipts; deny, that it is imposed without regard to whether said sales are made at a profit or loss or the amount of profit or loss therefrom; deny it has no relation to profits or losses; deny that it has no relation to the capital employed or invested; deny that it does not take into account the type of business; that it does not make any provision for the merchandise returned or for the cancellation of sales or resales of merchandise or the net amount of sales, or sales on credits for which payment is not received, or that the classification is solely as to the gross amount thereof by dollars or that it strikes at the increase in said gross sales by geometrical increase in the rate of taxation per $100,000 up to $1,000,000.

Defendants deny that said Act taxes the dollars of sales of certain retail merchants upon a rate or basis different from the dollars of sales of other merchants engaged in direct competition or similar circumstances, or imposes upon a merchant having gross sales of $800,000 a tax of $1,500 or seven and one-half times the tax imposed upon his competitor who does exactly one-half the volume, to wit; $400,000, or who is only subject to a tax of $200.

They deny that one retail merchant doing twice the business of his competitor is required to pay seven and one-half times as much tax or any times as much tax on his dollar of sales as his competitor who is similarly situated is required to pay on his dollar of sales; deny that said

classification is unreasonable, without a rational basis or is arbitrary, unequal, burdensome or oppressive.

XX

For answer to paragraph 20, defendants deny that any competitive stores, by reason of connection with co-opera-
[fol. 96] tive associations, agencies or organizations, although similarly or individually owned, enjoy any of the advantages which flow from group or co-operative buying on a large scale, the pooling of purchasing power, the ability to contract for buying their goods upon a large scale, or for the scientific or efficient arrangement of stores, window displays, or the development of merchandising methods through the employment, co-operatively, of experts or others experienced therein. They deny that said co-operative associations combine co-opertively as great or greater number of stores or have as great or greater purchasing power or buying power, or have as great or greater advertising or merchandising ability as the plaintiffs or as those retail merchants who own two or more stores in the Commonwealth of Kentucky, or conduct two or more departments in any retail store owned or operated by them. They deny that said singly or individually owned stores or members of co-operative associations are similarly circumstanced or are in direct competition with plaintiffs or other retail merchants owning two or more stores, or that said competitive stores, members of said associations or organizations, are not subject to taxation on the same basis, classification or rate as plaintiffs, or are, in practical operation and effect, exempt from any taxation under said Act, or that the plaintiffs are subject to taxation at the highest rate prescribed in said Act, or that such competitive stores are given undue or unfair economic advantages over retail stores of the plaintiffs or other retail merchants similarly situated or are in effect aided, helped or subsidized by said Act in their competition with plaintiffs or other retail merchants similarly situated.

XXI

For answer to paragraph 21, defendants deny that the efficient or successful method of conducting retail business
[fol. 97] in the Commonwealth of Kentucky, or elsewhere

in the United States, at the present time or any other time, is to sell merchandise at the lowest possible price, consistent with a small percentage of profit on each individual sale, endeavoring thereby to increase the volume of sales or to secure a more rapid turnover of merchandise or capital; deny that the retail merchant is required by reason of small percentage of profit on a single sale to have a large volume of sales or continuously to increase the volume in order to secure a fair return on the capital employed by him in his business. They deny that the highly competitive character of the retail business in which plaintiffs are engaged, or any other retail business in the Commonwealth of Kentucky or elsewhere in the United States, makes it necessary for each merchant to meet such competition or to conform his business methods therewith; deny that in conformity therewith plaintiffs, or any other retail merchants similarly situated, have built up or developed in Kentucky for themselves respectively a large or valuable business, upon the basis of selling merchandise at retail to the public, at the lowest possible prices, consistent with a small average profit in individual sales; deny that plaintiffs, or any other retail merchants similarly situated, are dependent upon a large volume of sales in order to secure a fair, reasonable or adequate return upon invested capital employed in the conduct of their business; deny that such merchandising methods are the basis of the business of plaintiffs or any other retail merchants similarly situated or are of benefit to the public of the Commonwealth of Kentucky, or have brought to plaintiffs, or any other merchants similarly situated, a large or valuable good will or a large sales volume.

[fol. 98] XXII

For answer to paragraph 22, defendants deny that the rates of taxation exacted by said Act are unfair, unjust, unequal, oppressive or discriminatory, or that such rates imposed upon plaintiffs or any other retail merchants similarly situated, imposed upon them an unjust or intolerable burden, or any burden, for the benefit of other retail merchants engaged in like business having a smaller volume of annual gross sales, or that the purpose of such Act is to destroy or impair the good will or established trade or

business, or to reduce the volume of annual gross sales made by plaintiffs or other retail merchants similarly situated, or to divert trade or custom from retail stores of plaintiffs or other retail merchants similarly situated who are taxed in the higher brackets of taxation, to the retail merchants who have smaller annual gross sales or who are taxed under said Act at rates lower than those exacted by said Act of plaintiffs or other retail merchants similarly situated.

They deny that said Act, in its purpose or effect, is lacking in conformity in its application to the persons or occupations taxed thereunder, or that it transfers to or imposes upon plaintiffs or any other retail merchants similarly situated, an undue proportion or the entire burden of the license taxes attempted in said Act to be levied upon retail merchants.

They deny that said Act discriminates in favor of retail merchants having a small or comparatively small volume of annual gross sales, or against any retail merchants, or that it levies a subsidy to be paid in any part by the plaintiffs, or other retail merchants similarly situated, who have annual gross sales in larger volume; deny that said Act denies to plaintiffs, or any other retail merchants similarly situated, the equal protection of the laws guaranteed to it or to them by the equal protection clause of the Fourteenth Amendment to the Constitution of the United States [fol. 99] or by the fundamental law of the State of Kentucky.

XXIII

For answer to paragraph 23, they deny that there is a large number, or any number, of retail merchants lawfully engaged in Kentucky in the operation of one store either with or without separate departments therein such as plaintiffs conduct in their retail stores, or in the operation of two or more stores either under the same management or controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management, which are in like situation with plaintiffs in that under said Act each of them is subject to taxation in the higher brackets, or that the rates

of taxation therein levied upon them by reason of the large volume of gross annual sales made by them is excessive, unjust or discriminatory, or that a large number of retail merchants are competing with them, or that such large or any number of retail merchants by reason of credits allowed under Section 4 of said Act are required to pay no tax or insignificant amount of tax.

They deny that the retail merchants conducting stores in Kentucky who are thus situated similarly to the plaintiffs are too numerous to be joined in this suit as parties plaintiff, or that the matters or things complained of in this bill or the questions herein raised as to the legality of the tax complained of, are all, or any, questions of common or general interest to any persons, or that such persons constitute a class so numerous as to make it impracticable to bring them all before the Court herein, or that this suit is brought on behalf of others besides plaintiffs, namely, Rodes Rapier Co. and Louis Appel Co.

[fol. 100] XXIV

For answer to paragraph 24 of said Bill of Complaint, defendants admit the allegations contained therein.

XXV

For answer to paragraph 25 of said Bill of Complaint, defendants admit that they are preparing for the administration and enforcement of said Act, but deny that they will attempt to enforce any drastic penalties against plaintiffs or others similarly situated, or that any irreparable injury or damage, or any injury or damage, would result to plaintiffs, or other retail merchants similarly situated.

XXVI

For answer to paragraph 26, they deny that Section 13, being the emergency clause of said Act, is void in that such emergency thereto cited has no connection with or relation to the purposes for which said challenged Act was enacted by the General Assembly, or under the decision of the Kentucky Court of Appeals in McIntyre vs. Commonwealth, 221 Ky. 16, or any other decision by the same Court, or that no reason meeting the requirements of Section 55, Kentucky Constitution, has been assigned for making said

Act take effect upon its approval by the Governor on March 17, 1930, instead of according to it the constitutional method or time prescribed by Section 55, or that said Act did not become effective prior to June 17, 1930.

They deny that the reasons for the emergency assigned in Section 13 deal solely with the inadequacy of the present State revenue to meet the immediate needs for the maintenance or development of the State Government or its agencies; deny that neither of the purposes is related to or connected with the maintenance or development of the [fol. 101] State Government or its agencies which are referred to in Section 13 of said Act as a reason for the latest emergency therein declared, or that said Act could not take effect under Section 55 of the Kentucky Constitution prior to June 17, 1930.

XXVII

For answer to paragraph 27, defendants deny that said Act in the various particulars hereinbefore set out is void because it violates the provisions of the Constitution of the United States or the Fourteenth Amendment thereof, or because it violates provisions of the Constitution of Kentucky as herein set forth, or for any reason.

(1) They deny that for the reason hereinbefore set forth, said Act is void in several particulars or respects hereinbefore pointed out.

(a) They deny that it denies to plaintiffs, or any other retail merchants similarly situated, due process of law, or that it is an attempt to levy upon them a tax that is confiscatory of their property, or is an attempt to take their property without due process of law as an arbitrary exaction insofar as any tax levied thereunder is measured by gross sales of retail merchandise made prior to June 17, 1930.

(b) They deny that it denies to plaintiffs, or any other retail merchants similarly situated, equal protection of the laws in that it exacts of the plaintiffs, or any other merchants similarly situated, an unjust, unreasonable, discriminatory, oppressive or prohibitive rate of taxation, or that it is based upon a classification as unreasonable, unjust or discriminatory against the plaintiffs, or any other retail

merchants similarly situated, or that it taxes plaintiffs, or any other retail merchants similarly situated at geometrically increased rates, graduated according to increased [fol. 102] volume of gross sales without reference to any other consideration whatever or without a reasonable basis of classification, or that it at the same time imposes upon other retail merchants doing the same kind of business in substantially the same way, any lower rate or burden of taxation, or as to any number of such retail merchants at all, exempts them from taxation under said Act, or that it allows to retail merchants doing business in corporate form a remission, in any part, of taxes levied under said Act, or a credit thereon, or that no such remission or like or corresponding credit is allowed to plaintiffs or other retail merchants who are not incorporated.

(c) They deny that for the reason hereinbefore set forth said Act abridges the privileges or immunities guaranteed to plaintiffs by the Fourteenth Amendment, or that it is illegal or void.

(2) They deny that said Act violates any principles of uniformity in the matter of taxes levied upon occupations, persons or property upon a reasonable basis of classification as such principles of uniformity are recognized by Sections 171 and 181 of the Constitution of the Commonwealth of Kentucky.

XXVIII

For answer to paragraph 28, they deny that Section 10 of said Act contains any provisions designed to deny to plaintiffs or other retail merchants attempted to be taxed under said Act, a remedy in advance of the payment of said tax, or likewise to deny a remedy after the payment of the tax imposed thereunder except that where the tax is paid under protest, the taxpayer may within two years after such payment bring in a court of competent jurisdiction in the Commonwealth of Kentucky, an action for mandamus against the Auditor of Public Accounts to compel him to draw his warrant upon the State Treasurer for the amount [fol. 103] of such tax as may be adjudged to have been wrongfully collected from such taxpayer.

They deny that such action could only be brought where the tax is paid under protest and after the payment, or that

it could only be brought or prosecuted in the courts of Kentucky, or that a judgment therein in favor of the complaining taxpayer could only result in obtaining a warrant upon the general fund of the State in the hands of the State Treasurer, to be paid as and when funds were available for the payment of such warrant in the usual and orderly course, or that such taxes collected under said Act do not go into the general fund of the Commonwealth, or that they are immediately appropriated or applied as provided in said Act, or that there are now outstanding any State warrants drawn by the Auditor of Public Accounts upon the general fund in the hands of the State Treasurer which have been outstanding since June, 1927, or any time, or that they can not be collected by the owners or holders thereof for lack of funds in the State Treasury during such period for the payment of such warrants.

They deny that as of January 1, 1931, the money in the General Fund of the State Treasury in the office of the State Treasurer was $12,5[illegible]81, or that at that time there were outstanding warrants aggregating $9,880,502.76 drawn by the Auditor of Public Accounts and presented for payment to the State Treasurer, but were not paid for lack of funds.

XXIX

For answer to paragraph 29 of said Bill of Complaint, defendants admit that they will enforce said Act, but deny that such act is illegal, and say that they do not have sufficient information to answer the allegations contained in paragraph 29 as to the amount of the tax owed by plain-
[fol. 104] tiffs, and therefore neither admit nor deny the same, but require strict proof thereof.

They deny that by reason of the facts herein set forth plaintiffs have no remedy in the State courts of Kentucky, or no remedy at law in the courts of the United States, or that there are no available funds to refund said tax in the event of a judgment in the State Court commanding such refund.

XXX

Defendants for answer to paragraph 30 deny that unless they are enjoined or restricted from enforcing or attempting to enforce said Act, plaintiffs or any others similarly situated will sustain irreparable loss, or any, loss for which

they have no plain, adequate or complete remedy at law, or any remedy at all in the courts of Kentucky in any of the following particulars.

(1) They deny that plaintiffs or any others similarly situated, will be compelled to pay taxes pursuant to an invalid or unconstitutional method or for which they are not legally liable.

(2) They deny that upon failure of the plaintiffs, or others similarly situated, to pay said taxes, that the enforcement or attempted enforcement of penalties provided by said Act against plaintiffs, or others similarly situated, will result in plaintiffs, or others, being compelled to defend innumerable prosecutions or any prosecutions brought to recover said taxes or penalties or criminal proceedings brought to impose criminal penalties provided in Section 7 of said Act, or at great or any expense to it or them.

(3) Defendants deny that they will expend public funds raised by taxation for the purpose of preparing to enforce or carry out provisions of said Act to the irreparable injury or damage of the plaintiffs or any injury or damage of [fol. 105] plaintiffs as taxpayers of the Commonwealth of Kentucky.

(4) Defendants deny that if plaintiffs or others similarly situated should pay said taxes under protest or be compelled to commence actions to recover the same as provided in Section 10 of said Act, they will be put to large or any expense for attorneys' fees or court costs, or will be required to bring a multiplicity of actions in order to recover said moneys, or that said Act contains no provisions of any kind for the reimbursement to plaintiffs of said sums which it would be required to expend in prosecuting such actions for attorneys' fees, expenses, court costs or other expenses, or that plaintiffs or others will be required to expend any such sum. They deny that no waiver is provided of the right of the Commonwealth of Kentucky to defend any action brought in courts of the United States as a suit against a State within the meaning of the Eleventh Amendment of the Constitution of the United States, or that in consequence thereof plaintiffs, or others similarly situated, do not have a plain, adequate or complete remedy in an action at law in the courts of the United States.

They deny that the only remedy afforded by said Act, or by any laws of the Commonwealth of Kentucky, is a suit at law in the Franklin Circuit Court against the Auditor of Public Accounts for a mandamus to compel him to draw his warrant upon the Treasurer for the amount of taxes erroneously exacted of the taxpayer or paid by him under protest, or that same appears from Section 10 of said Act of 1930, or from Section 162, Kentucky Statutes, or that these are the only statutes of the State of Kentucky which afford any remedy in such cases to the taxpayer from whom illegal taxes have been collected by the State of Kentucky.

Deny that by no other statute has the Commonwealth of Kentucky ever consented to be sued itself or through any of [fol. 106] its officers for the recovery of taxes illegally exacted from a taxpayer and covered into the Treasury of the State.

(6) They deny that said Act is ambiguous or doubtful as to its application or meaning, or as to the procedure or requirement thereunder, or has never been interpreted by the Court of Appeals of the Commonwealth of Kentucky.

(7) They deny that the amount of said annual tax which plaintiffs will be required to pay under terms of said Act will be a substantial portion, or any portion, of the capital invested by them in their retail stores or needed by them to carry on their business therein. They deny that the payment of such sum of money will impair the ability of the plaintiffs to operate their business in Kentucky, or will at all decrease the amount of annual business which they will be enabled to do, or will give competitors of plaintiffs who are not required to withdraw any money from their respective businesses or who are not required to withdraw a proportionate sum therefrom, any unfair or undue advantage over the plaintiffs, for which the plaintiffs have no plain, adequate or complete remedy at law, or that the same is true as to any other retail merchant similarly situated.

(8) They deny that the enforcement of said Act will have the effect of injuring or impairing any lawful business in which the plaintiffs or others similarly situated are engaged, or in which they have the undoubted right to engage, or which right is guaranteed or protected by the State or Federal Constitution.

XXXI

For further answer defendants deny each and every allegation contained in plaintiff's bill of complaint not heretofore specifically denied, controverted or admitted. [fol. 107] For further answer the defendants aver and allege as follows:

1. The Act in question (H. B. 111, now Chapter 149 of the Acts of the General Assembly of Kentucky, 1930 session) levies a tax, graduated progressively as to rates upon all sales of goods at retail in this Commonwealth.

2. The classification, made as a basis for the tax imposed by said Act, rests on the volume of gross retail sales and also upon ability of those affected by the various graduation- of said act to pay the tax at the rate levied, it being a well recognized law of merchandizing that the percentage of income of capital invested increases progressively in the same, or approximately the same, ratio to the volume of sales as does the rate levied by said Act; that is to say, those merchants having a great volume of sales have a much greater ability to pay the higher rates levied under said act than merchants having a smaller volume of sales; for example, this plaintiff, and those similarly situated, have as a class an income upon the capital invested in the retail business in this state of —%, while individual merchants competing with plaintiffs, and those similarly situated, having gross annual sales of less than $400,000.00 earn an income on their capital invested in the retail business of only —%. The defendants further say that the example set out above is illustrative of the progressive increased ratio of earning power of invested capital to volume of sales.

3. The defendants say that the progressive increase of earning power of invested capital, based on volume of sales, as illustrated heretofore, conclusively proves a proportionate increase of ability to pay the tax levied by the act in question.

4. The defendants further allege that the plaintiffs, Levy Bros., and other- similarly situated, have for many years enjoyed a large and prosperous retail business in this state, and that the gross annual retail sales in many instances

[fol. 108] have exceeded $— per annum, and that they have, for many years, made a profit of more than —% on the aggregate of said annual sales, and that this represents a net income on capital, invested in the retail business in this state, of more than —%. They say, however, that merchants affected by the lower graduation of said tax earn a much lower return on the amount of capital invested, and that this is especially true of those having gross annual business of less than $400,000.00.

5. The defendants further allege that the great volume of business enjoyed by the plaintiffs, and those similarly situated and the consequent progressive increase in ratio of income from invested capital to volume of business, is brought about by the operation of natural and well recognized economic laws as follows:

(a) Purchasing power increases progressively with volume of sales.

(b) As purchasing power increases, prices decrease.

(c) As volume increases, expenses decrease.

(d) As volume increases the ratio of turnovers or volume of sales to capital invested progressively increases.

6. Defendants further allege that the tax imposed by the Act in question was designed, intended and, in practical operation and effect, does equalize the tax burden heretofore borne by retail merchants in this Commonwealth and that said equalization is brought about by reason of the fact that the individual merchants in this State, competing with this plaintiff, have heretofore and are now bearing an unjust and disproportionate share of the tax burden and that the imposition of the graduated tax levied by this Act will equalize said burden in that those who are now paying [fol. 109] the greatest amount of taxes in ratio to the capital invested will be taxed at the minimum rate under said Act, while those merchants having a great volume of sales and paying a small precentage of taxes on invested capital will be taxed at the higher rates under said Act.

7. Defendants further say that the above result is brought about in part by the fact that property is assessed for ad valorem taxes in this State on July 1st in each year,

and that the amount of goods, wares and merchandise on hand in this State on that date determines the amount of taxes to be paid for State purposes. They say that this plaintiff and others similarly situated, by reason of the fact that they do a maximum amount of business on a minimum stock of goods, are enabled to and do pay a much smaller tax rate, based on volume of retail business, than that paid by merchants having a small annual gross business who are forced to compete directly with this plaintiff and others similarly situated; that this plaintiff and others similarly situated, are enjoying a great volume of business in this Commonwealth and are not now paying and have never paid their just and due proportion of the taxes levied upon retail merchants, and are not now paying and have never paid for State purposes taxes at a greater rate than —% upon their volume of sales, while their smaller competitors have been forced to pay —% on their volume of sales.

8. Defendants say that House Bill 111, Chapter 149 of the Acts of the General Assembly of 1930, was introduced, passed, enrolled, and signed in the manner shown by the certified copies of the entries in both House and Senate Journal relating to said bill, such certified copies are filed herewith and made a part hereof as if copied in full, marked for identification "Exhibit A."

Defendants further say that said bill was introduced, passed, enrolled, and filed in exact conformity with the Constitution and laws of the State of Kentucky.

[fol. 110] 9. For a separate and distinct defense in point of law arising upon the face of the Bill of Complaint herein, the defendants say that the facts alleged in said Bill of Complaint are insufficient to constitute a valid cause of action.

Wherefore defendants pray judgment that the Bill of Complaint be dismissed and held for naught; and the prayer thereof denied; for all costs about this action expended, and for all proper relief.

J. W. Cammack, Attorney General; S. H. Brown, Assistant Attorney General; Howard Smith Gentry, Frankfort, Kentucky, Solicitors for Defendants. Batson, Cary & Welch, Louisville, Kentucky; Leslie W. Morris, Frankfort, Kentucky, of Counsel.

[fol. 111] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO STATEMENT OF EVIDENCE—Filed March 23, 1932

This case having been heard with the case of Stewart Dry Goods Company v. John B. Lewis, et al., (simultaneously herewith appealed to the Supreme Court of the United States) upon the plaintiffs' motion for an interlocutory injunction, and the same testimony having been read in each case, it is agreed by counsel that the narrative of testimony printed in the record of the said Stewart Dry Goods Company case shall be considered as a part of this record upon appeal without the necessity of duplicating same in this record.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Appellant.
Bailey P. Wootton, Atty. Gen. Ky.; S. H. Brown, Asst. Atty. Gen., Ky., Solicitors for Appellees.
H. W. Batson, J. Whitcomb Welch, Leslie W. Morris.

[fol. 112] IN UNITED STATES DISTRICT COURT

ORDER OF SUBMISSION—February 14, 1931

This day the above-styled three cases came on for hearing before Hon. Charles H. Moorman, Circuit Judge, Hon. Charles I. Dawson, District Judge, and Hon. A. M. J. Cochran, District Judge, on motion of the respective plaintiffs for an interlocutory injunction.

By agreement of parties plaintiff and defendant, the above-styled three cases are heard together upon the pending motions for an interlocutory injunction, and the same evidence was heard in these cases as in the case of Kroger Grocery & Baking Company against the same defendants, pending in the Eastern District of Kentucky and heard at the same time.

The plaintiffs by counsel filed and read the deposition of Shirley E. Haas and exhibits therewith and the affidavits of the following persons:

Robert W. Lyons,	John B. Bonham,	W. A. Steiden,
D. T. Petty,	Gilbert J. Schneider,	Albert Berger,
John E. Donahue,	John Scanlan,	Chris Schumann,
Louie J. Jones,	Brack M. Ferrill,	Arch B. Davis,
M. R. Anderson,	C. J. Henry,	Harmon Noe,
R. W. Owens,	Crawford Lee,	Robert J. McKim,
Fred Levy,	Dann Byck,	C. B. Turley,
N. A. Bash,	G. H. Parker,	James R. Karibo,
B. E.Van Antwerp,	C. R. Leininger,	E. R. Probasco,
M. S. Gesley,	W. G. Howell,	E. C. Purvis,
W. T. Morgan,	A. C. Miller,	O. A. Rhodes,
H. H. Craven,	W. G. Jenkins,	Robert Wright,
C. W. Gowin,	T. B. Jones,	P. O. Wolverson,
J. A. Gude,	B. E. Willis,	J. D. Delano,
L. M. Ross,	B. A. Aistrop,	H. C. Amstutz,
Milton Marx,	Dolph Wile,	C. H. Parsons,
Paul H. Nystrom,	Daniel M. Cohen,	James W. Stites.

and a synopsis and analysis of reports concerning the Gross Sales Tax in controversy, signed by Joseph Martin, Supervisor of the Gross Sales Tax Department, and A. H. Brendel, Certified Public Accountant.

Came the defendants by counsel and entered a motion to dismiss the bill of complaint in each of the above-styled three cases, and, not waiving same, entered motion to strike [fol. 113] out certain parts of the bill of complaint in each case, and, not waiving same, filed an answer in each case.

Likewise defendants filed and read in evidence upon the hearing of plaintiffs' motion for interlocutory injunction in each of the above cases the affidavits of Henry F. Walradt, together with Exhibits A, B, C, D, E, F, G, H, I, and J; the affidavit of James W. Martin, together with Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16; the affidavit of Clyde W. Phelps; the affidavit of B. T. Brewer; and a certified copy of the House and Senate Journal relating to the introduction, passage, approval, and enrollment of House Bill No. 111 of the 1930 Session; and a certified copy of the Gross Retail Sales Tax Law; the deposition of Walter Burre and a paper dated Feb. 13, 1931, in regard to retail gross sales tax reports audited.

Thereupon these cases were argued by counsel for the respective plaintiffs and defendants and ordered to be submitted upon plaintiffs' pending motions for an interlocutory injunction, and the Court, not being fully advised, takes time.

Leave is given to plaintiffs to February 28, 1931, and to defendants to March 10, 1931, within which to file briefs.

It is further ordered and adjudged that the temporary restraining order heretofore entered in each of the above-styled cases be and the same is hereby continued in full force and effect until the determination of plaintiffs' motion for an interlocutory injunction entered therein respectively.

Chas. H. Moorman, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

[fol. 114] IN UNITED STATES DISTRICT COURT

KROGER GROCERY & BAKING COMPANY, Plaintiffs,

vs.

JOHN B. LEWIS, SELDEN GLENN, and HENRY M. CLINE, as Members of the State Tax Commission of the Commonwealth of Kentucky, and Clell Coleman, Auditor of Public Accounts of the Commonwealth of Kentucky, Defendants

Before Moorman, Circuit Judge, and Cochran and Dawson, District Judges

OPINION—Filed December 9, 1931

In this action plaintiff, an Ohio corporation, owning and operating a chain of retail grocery stores in the United States, two hundred and sixty-three of which are located in different parts of the Commonwealth of Kentucky, attacks Chapter 149 of the 1930 Acts of the General Assembly of the Commonwealth of Kentucky, commonly known as the Retail Merchants' Gross Sales Tax Act, as violative of the Federal and State Constitutions. The case is now before us on application of the plaintiff for an interlocutory injunction, under Section 266 of the Judicial Code (28 U. S. C. A., Section 380).

At the threshold of the case we are met with the contention of the defendants that a Federal court of equity is without power to grant the relief sought, for the reason that the law of Kentucky affords plaintiff an adequate remedy at law for any injury sustained by it resulting from its enforced compliance with the terms of the Act. A [fol. 115] decision of this question involves a construction of Section 10 of the Act, which reads as follows:

"No suit shall be maintained in any court to restrain or delay the collection or payment of the tax herein imposed upon any ground whatever, but the aggrieved taxpayer shall pay the tax as and when due, and if paid under protest may at any time within two years from the date of such payment sue the Auditor of Public Accounts in an action at law to recover the tax so paid, with legal interest thereon from the date of payment. If it is finally determined that said tax, or any part thereof, was wrongfully collected for any reason, it shall be the duty of the Auditor of Public Accounts then in office to issue his warrant on the Treasurer of the Commonwealth of Kentucky for the amount of such tax so adjudged to have been wrongfully collected, together with interest thereon, and the Treasurer shall pay same out of the General Fund of the State. A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed."

If this section of the Act affords to the aggrieved taxpayer a remedy as certain, complete, practicable and efficient as is available in equity, and if the remedy thus afforded is available in the Federal courts, other jurisdictional requirements appearing, then this action must be dismissed. The declared purpose of Section 10 is to prevent injunctive interference with the operation of the law. It is quite apparent from a reading of this section that its draftsman was familiar with the rule, that in order to make effective the prohibition against injunctive interference, the statute must furnish an adequate remedy at law in lieu thereof. The effort in Section 10 is to afford such adequate remedy at law, and, in view of the well settled rule that such a remedy must be available in the Federal Courts, if the necessary jurisdictional facts exist, it will

not be presumed that the legal remedy provided was intended to be confined to the State courts, unless the language of the Act requires such construction. On the contrary, the statute will be construed to render effective the evident legislative intent, if such construction is not inconsistent with the plain language of the Act. Of course, the common law action authorized by Section 10 against the [fol. 116] Auditor of Public Accounts is, in reality, an action against the State. The section does not contemplate that the Auditor shall personally satisfy any judgment obtained under its provisions. By its express terms the ultimate liability is that of the State, and the Auditor is simply designated as a convenient alter ego of the State in suits for the recovery of taxes and interest claimed to have been illegally collected under the Act in question. Highway Commission of Wyoming v. Utah Construction Co., 278 U. S. 194. So we must regard Section 10 as the standing consent of the State, subject to the conditions therein imposed, to be sued for the recovery of taxes exacted under the provisions of the Act in question. Of course, when a sovereign consents to be sued, it may fix the conditions under which such suit may be maintained. It may even name the court in which such suit may be maintained, and the State's consent to be sued in its own courts can not be enlarged into a consent to be sued in a Federal court. Chandler v. Dix, 194 U. S. 590; Murray v. Wilson Distilling Co., 213 U. S. 151.

We are unable, however, to agree with the suggestion of the plaintiff that Section 10 limits the common law action therein provided for to State courts. The section contains no language, expressly or by implication, so limiting the cause of action. The language is certainly broad enough to authorize actions in the Federal courts, and having in mind the evident purpose of the General Assembly to provide an adequate remedy at law for all taxpayers under the Act, we conclude that the legal remedy provided by Section 10 was intended to be available in the Federal courts, as well as in the State courts. Such being the case, Section 10 operates as a waiver — the immunity against suits in Federal Courts granted to States by the Eleventh Amendment to the Federal Constitution.

[fol. 117] The plaintiff contends that even conceding that it is the purpose of Section 10 to make the legal remedy

provided by that section available in the Federal courts, such purpose is aborted by reason of the fact that the suit at law authorized by that section is a mandamus proceeding, of which United States District Courts have no original jurisdiction. If the premise thus advanced is sound, the conclusion necessarily follows, as it is well settled that Federal courts are without jurisdiction to issue a writ of mandamus in an original action brought for the sole purpose of securing relief by such writ. Marbury v. Madison, 1 Cranch, 137; Covington Bridge Co. v. Hager, 203 U. S. 109; Knapp v. Lake Shore & Michigan Southern Ry. Co., 197 U. S. 536. But we can not agree with the premise. The common law suit authorized by Section 10 is not an original mandamus proceeding. It is an ordinary common law action against the Auditor of Public Accounts in his official capacity as the agent and representative of the State for a money judgment for the amount of taxes paid under the Act under protest, and interest thereon. The suit has none of the characteristics of an original mandamus proceeding. If, after judgment is obtained, the Auditor then in office declines to issue a warrant for the amount of such judgment and interest, the Federal court which rendered the judgment could issue a mandamus to compel the issual of such a warrant. Such a writ, however, would not be one issued in an original mandamus proceeding, but would be one issued in aid of the court's jurisdiction, which had already attached in the common law action for a money judgment. The issual of the writ in such a situation is authorized by Section 262 of the Judicial Code (Title 28, Section 377, U. S. C. A.) and is fully justified by the authorities. County of Green v. Daniel, 102 U. S. 187; Davenport v. County of Dodge, 105 U. S. 237.

We do not agree with the suggestion of the plaintiff [fol. 118] that the settled and approved practice under Section 162 of Kentucky Statutes fixes the nature of the proceeding under Section 10 of the Act in question. Section 162 is, in part, as follows:

"When it shall appear to the Auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the Treasurer for such money so improperly paid in behalf of the person who paid the same."

This section makes no provision whatever for a common law action against the Auditor for a money judgment. It simply lays upon the Auditor the duty in a proper case of issuing his warrant for the taxes illegally or improperly collected. If he fails in the performance of this statutory duty, then mandamus in the State court is the only remedy against him, and in such proceeding the court must determine if he wrongfully refused to issue warrant for the amount claimed. Under Section 10 of the Act under consideration, however, the statutory duty of the Auditor to issue his warrant never arises until the amount for which the warrant is to be issued has been fixed by a money judgment in a common law suit. The difference between the two provisions of the statute is obvious. Furthermore, if the remedy under Section 10 is the same remedy granted by Section 162 of Kentucky Statutes, there would have been no occasion for the incorporation of Section 10 in the Act under consideration. We must and do regard Section 10 as a specific remedy at law, intended to apply only to the recovery of taxes exacted under the Gross Sales Tax Act.

The plaintiff suggests that conceding that Section 10 gives a right of action in Federal courts, still the remedy at law is not adequate, for the reason that the General Fund of the State, out of which Section 10 directs the warrants to be paid, is not in such condition as to enable these warrants to be paid within a reasonable time after they are issued. In support of this argument plaintiff has introduced proof, showing that there are now outstanding nearly ten million dollars of warrants against the General Fund, [fol. 119] and that this fund is usually over two years behind in the redemption of warrants drawn against it. It may be conceded that if taxpayers obtaining judgments under Section 10 were compelled to wait an unreasonable length of time for their money, the remedy at law given by this section would not be adequate; but no such unreasonable delay is indicated. The fair and reasonable meaning of that part of Section 10 which provides for the payment of warrants issued in satisfaction of judgments obtained under that section is that such warrants shall be paid when presented, if there is sufficient money in the

General Fund to do so, even though there may be outstanding other and prior warrants against this fund. The general law of Kentucky contains no express direction to the Treasurer to pay warrants drawn on the treasury in the order of their issue, although such is probably the fair inference to be drawn from language used in Section 4688a-4, Kentucky Statutes, Carroll's 1930 Edition, and the Court of Appeals in the case of Rhea v. Newman, 153 Ky., 604, held that the Treasurer should pay them in the order issued, for the purpose of insuring fair treatment to all. Bearing in mind, however, that the purpose of Section 10 is to afford the taxpayers entitled to its provisions a full and complete remedy at law, and that this remedy would not be full and complete unless the holders of judgments obtained under its provisions could secure the reasonably prompt payment thereof, it seems entirely consistent to hold that it was the purpose of the General Assembly to give warrants issued in satisfaction of judgments obtained under Section 10 priority of payment over other outstanding warrants against the General Fund, and to that extent to make an exception to the general rule as to the order of payment of State warrants. Such a construction of the section does no violence to its language and works no impairment of any contract obligation of the State to holders of prior warrants, as such outstanding warrants do not [fol. 120] pledge the State to redeem them at any particular time. Even if we should be mistaken in this construction of Section 10, and if warrants issued under its provisions enjoy no priority of payment, we would not be justified in holding that taxpayers recovering judgments under Section 10 would be required to wait an unreasonable length of time to realize on such judgments.

Under the general law of Kentucky, when a warrant against the General Fund is presented for payment, and the fund is not sufficient to satisfy same, the Treasurer must stamp same as interest bearing, and it thereafter draws interest at the rate of five per cent per annum, payable semi-annually, until called for redemption. (Section 4688a-2, Kentucky Statutes, Carroll's 1930 Edition.) Such warrants by the law of Kentucky are made negotiable instruments and are exempt from State and local taxation. (Section 4688a-8, Kentucky Statutes, Carroll's 1930 Edition.) It appears that these warrants are readily salable,

and the record fails to disclose that any concession in the way of discount must be made to effect their sale. It will be observed that Section 10 not only provides for the recovery of the taxes paid, but for interest thereon as well. So far as we are advised, the Supreme Court has never held that the recovery of interest on taxes paid is necessary in order to make the remedy at law adequate. On the contrary, it is fairly deducible from the cases that the remedy at law is adequate, even though no recovery of interest is allowed. In the cases of Shelton v. Platt, 139 U. S. 591, and Allen v. Pullman Palace Car Co., 139 U. S. 658, the Supreme Court held that a law of Tennessee which permitted a taxpayer to recover from the State taxes paid under protest if they were wrongfully collected, but which made no provision for the recovery of interest, afforded an adequate remedy at law. Inasmuch as it is a settled principle of law that interest can not be collected from a sovereign State unless its recovery is specifically authorized by a State statute, we can not presume that the [fol. 121] Supreme Court in the cases referred to went on the assumption that interest as a matter of right followed the judgment. So we think it may be safely said that in permitting the recovery of interest under Section 10, the Commonwealth has bound itself to return more than was necessary in order to meet the test of an adequate remedy at law. Therefore, even if it appeared as a fact that some discount must be accepted by those who sell warrants issued under Section 10, it is probable that such discount would not exceed the interest which had accumulated on the tax from the date of its payment to the date of the rendition of the judgment. Furthermore, the State of Kentucky has no bonded indebtedness and is entirely solvent. Subject to the requirement of uniformity, the power of the General Assembly to tax for public purposes of the State is unlimited, and with this unlimited power residing in the General Assembly, this court will not assume that under Section 10 an aggrieved taxpayer can not recover within a reasonable time the full amount of the taxes paid.

Neither are we impressed with the contention of the plaintiff that Section 10 does not afford an adequate remedy at law, because under it a taxpayer would be compelled to resort to a multiplicity of suits to recover the various payments made under the Act. There is no neces-

sity for a multiplicity of suits under Section 10. That section specifically provides that—

"A separate suit need not be filed for each separate payment made by any taxpayer, but a recovery may be had in one suit for as many payments as may have been made, and which are not barred by the limitation of two years herein imposed."

This is the law even though such a provision had not been incorporated in Section 10. Therefore, the plaintiff may unite in one suit its claims growing out of each payment of taxes made under the Act up to the time of filing its suit, [fol. 122] and that action would fully determine every question which could be determined in an equitable action. There would be no necessity for other suits, except possibly to avoid the running of the statute of limitations pending the final determination of the suit already filed. A court of equity will not interfere on the ground of multiplicity of suits, where such multiplicity consists of suits by the same plaintiff against the same defendant for causes of action arising out of the same facts and legal principles. A multiplicity of suits in such a situation would be a multiplicity of the plaintiff's own making, and would afford no ground for equitable intervention. Boise Artesian Water Co. v. Boise City, 213 U. S. 276; Standard Oil Co. v. Atlantic Coast Line Co., 13 Fed. (2d) 653. We will not assume that after the validity of the tax has been once definitely settled in an action at law, the State will make any attempt to enforce further collections.

Finally, the fact that the Act imposes drastic penalties for failure to comply with its terms, and pay the tax when due, affords no basis for equitable intervention. The Act visits these penalties upon the taxpayer only in event of failure to comply with its terms and pay the tax. To test the validity of this Act in an action at law, it is not necessary for the plaintiff to refuse to pay the tax and take the hazard of the courts deciding against him when the State undertakes in a legal action to enforce the penalties. All the taxpayer is required to do is to pay the tax, and when he has done this, he not only avoids the imposition of penalties, but has open to him a simple and direct way in a common law suit of attacking the validity of the law and of recovering the taxes paid, with interest thereon.

We therefore conclude that the remedy afforded by Section 10 of the Act is an adequate one within the Federal rule, and the motion to dismiss for want of equitable jurisdiction must be sustained.

[fol. 123] November 6, 1931.

Chas. H. Moorman, U. S. Circuit Judge. A. M. J. Cochran, U. S. District Judge. Chas. I. Dawson, U. S. District Judge.

Nichols, Morrill, Wood, Marx & Ginter, Cincinnati, O.; Trabue, Doolan, Helm & Helm, Louisville, Ky., Attorneys for Plaintiff.

J. W. Cammack, Attorney General, Frankfort, Ky.; S. H. Brown, Asst. Attorney General, Frankfort, Ky.; H. S. Gentry, Batson, Cary & Welch, Louisville, Ky.; Leslie W. Morris, Frankfort, Ky., Attorneys for Defendants.

[fol. 124] ORDER AND DECREE—Entered by Judge Chas. I. Dawson et al. December 9, 1931

This cause having been heard by consent of parties, together with the causes of The Stewart Dry Goods Company against the same defendants, and The J. C. Penney Company, against the same defendants, pending in this court, and the cause of The Kroger Grocery & Baking Company against the same defendants, pending in the United States District Court for the Eastern District of Kentucky, and having been submitted with them on February 14, 1931, upon plaintiffs' motion for an interlocutory injunction heard by the court upon the depositions, affidavits and exhibits referred to in the order of submission as having been introduced by plaintiffs and defendants respectively, this Court, being advised, on November 6, 1931, delivered its written opinion entitled in the cause of The Kroger Grocery and Baking Company against John B. Lewis et al., a copy of which opinion is now filed in this cause as a part of the record herein and as equally applicable to this cause, and pursuant thereto, and solely for the reasons stated in said opinion, plaintiffs' said motion for an interlocutory injunction herein is hereby denied, to which the plaintiffs except.

It is further ordered by the Court that this cause be and it is hereby submitted upon motion of the defendants to

dismiss the bill, and the Court, being of opinion that there is a plain, adequate and complete remedy at law, afforded to the plaintiffs for the reasons set forth in their said opinion, declines to consider any issue or question raised herein except the single question as to the adequacy of the remedy at law, and, solely for the reasons stated in its said opinion, sustains the motion of defendants to dismiss the bill, and denies to the plaintiffs a permanent injunction or [fol. 125] any injunctive or other relief prayed by them.

It is therefore adjudged and decreed that the plaintiffs' bill herein be dismissed, and that the defendants recover of the plaintiffs their costs herein expended: to all of which the plaintiffs except.

The plaintiffs having this day stated in Court their intention to appeal from this Order and Decree, denying plaintiffs' motion for an interlocutory injunction, and denying their application for a permanent injunction, and dismissing their bill of complaint, it is hereby further ordered and adjudged that the Temporary Restraining Order heretofore issued in this cause shall be continued in effect as to the plaintiffs, and as to each retail merchant listed of record (by Order entered herein March 30, 1931, and supplemented as to Ben Snyder, Incorporated, by later Order) as included in the same class of taxpayers as plaintiffs, and shall remain in full force and effect as to the plaintiffs and each of said taxpayers so listed, until the final determination of plaintiffs' said appeal, to all of which defendants except and object; Provided, however, that the plaintiffs, for themselves only, and each of said taxpayers so listed desiring to avail himself or itself of the benefit of said restraining order pending such appeal, for himself or itself only (and not one for another), shall within thirty (30) days from the entry of this Decree execute such bond or make such deposit of money or securities as required herein and as may be reasonably necessary to secure the Commonwealth of Kentucky against loss of any taxes, interest, court costs, and all other proper charges that may be or become due from such taxpayer under the Act assailed herein by plaintiffs, in the event the validity of such Act should be finally established.

The amount of any such bond given and the amount or value of securities or money deposited by any taxpayer,

[fol. 126] shall be fixed at an amount equal to the estimated taxes claimed from said taxpayer for the taxable period of 1930 and 1931, and said bond shall be secured by corporate surety or the pledge and deposit of negotiable securities acceptable to the Attorney General of Kentucky.

In the event the plaintiffs or any one of said taxpayers shall fail to execute such bond or give such security as required of it or him or them, within thirty (30) days from the entry of this Order and Decree, said restraining order as to such taxpayer so failing shall be thereupon immediately dissolved and shall afford no further protection to such taxpayer.

Upon the execution by the plaintiffs herein of a bond secured as herein provided, the bond or bonds heretofore executed by the plaintiffs in this cause shall be cancelled as to all future liability, and the like order is made as to the bond heretofore executed herein by Ben Snyder, Inc., upon its compliance, within thirty (30) days, with the provisions of this Order by the execution of a new bond or the deposit of securities as herein required.

Chas. H. Moorman, Circuit Judge. Chas. I. Dawson, District Judge. A. M. J. Cochran, District Judge.

[fol. 127] IN UNITED STATES DISTRICT COURT

ORDER APPROVING BONDS—January 7, 1932

This day came the parties in the above-styled three causes, by counsel, and filed of record herein bonds executed by the plaintiffs and other taxpayers hereinafter listed, in compliance with the order and decree of this court entered herein December 9, 1931, conditioned as therein provided, to secure the Commonwealth of Kentucky on account of its claims for taxes for the years 1930 and 1931, together with interest, court costs and all other proper charges that may accrue thereon against the following named taxpayers respectively:

The Stewart Dry Goods Company,
Levy Bros.,
J. C. Penney Company,
Kaufman Straus Company,

H. P. Selman & Company,
Montgomery Ward & Co., Incorporated;
Herman Straus & Sons Company, Inc.;
J. Bacon & Sons,
John C. Lewis Company, Inc.;
Central Furniture Company,
Byck Bros. & Co., Inc.;
Ewing-Von Allmen Dairy Company, Inc. (Successors to D. H. Ewing's Sons);
Hook Drug Company, Inc.;
S. M. Goldberg Operating Co.,
Ben Snyder, Inc.

Said bonds with their respective sureties and/or securities deposited and pledged thereon are hereby accepted and approved as a compliance with the order and decree of this Court above-mentioned.

Chas. I. Dawson, Judge.

[fol. 128] In United States District Court

Stipulation re Substitution—Filed March 1, 1932

This day, came the parties herein, by counsel, and stipulated that J. Dan Talbot, a citizen and resident of the Western District of Kentucky, was duly elected Auditor of Public Accounts of the Commonwealth of Kentucky at the November election in 1931; that the term of office of Clell Coleman as Auditor of Public Accounts expired on January 4, 1932, whereupon the said Coleman left said office and the said J. Dan Talbot, on said date, duly qualified and took the oath of office as Auditor of Public Accounts of the Commonwealth of Kentucky, succeeding said Coleman, and is now the duly qualified Auditor of Public Accounts of the Commonwealth of Kentucky.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Counsel for Plaintiff. S. H. Brown, Counsel for Defendants.

[fol. 129] IN UNITED STATES DISTRICT COURT

ORDER SUBSTITUTING AUDITOR OF PUBLIC ACCOUNTS, ETC.—March 1, 1932

This day came the parties herein and filed a stipulation noting that the term of office of the defendant, Clell Coleman, has expired within six months of the date hereof, and the said defendant has retired from said office and was thereupon succeeded therein by J. Dan Talbot,

And it appearing to the Court that there is a substantial need for continuing and maintaining this cause and obtaining an adjudication of the questions involved,

It is ordered that J. Dan Talbot, Auditor of Public Accounts of the Commonwealth of Kentucky, be and he is herby substituted as a defendant herein in lieu of the defendant, Clell Coleman, and with the same effect as if he had been an original defendant to the bill of complaint herein, and said cause is continued and maintained against the said J. Dan Talbot, Auditor of Public Accounts of the Commonwealth of Kentucky.

Chas. H. Moorman, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

[fol. 130] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed March 1, 1932

The plaintiffs, Fred Levy et al., conceiving themselves aggrieved by the order and decree entered herein by this Court on the 9th day of December, 1931, in the above-entitled cause, insofar as said order and decree denies the motion of these plaintiffs, after notice and hearing, for an interlocutory injunction restraining the defendants as prayed in the motion of plaintiffs for such interlocutory injunction, hereby appeal to the Supreme Court of the United States from said order and decree denying their motion for an interlocutory injunction as prayed therein.

The plaintiffs, further conceiving themselves aggrieved by the said order and decree entered herein on the 9th day of December, 1931, insofar as said order and decree sustains the motion of the defendants herein to dismiss these

plaintiffs' bill of complaint and directs the dismissal of said bill of complaint and denies to these plaintiffs a permanent injunction or any injunctive or other relief prayed by them and adjudges that plaintiffs' said bill of complaint be dismissed and that the defendants recover of plaintiffs their costs in this cause expended, hereby appeal to the Supreme Court of the United States from said order and decree insofar as it sustains the motion of said defendants to dismiss the bill of complaint herein and denies to these plaintiffs a permanent injunction, or any injunctive or other relief prayed by them, and decrees that their said bill of complaint be dismissed and that the defendants recover of these plaintiffs their costs in this cause expended.

The appeals herein prayed are taken upon the grounds and for the reasons specified in the assignments of errors filed herewith pertaining to the respective portions therein [fol. 131] designated of said order and decree herein appealed from.

Plaintiffs pray that their said appeals be allowed, and that a citation be issued thereon, directed to the above-named defendants, John B. Lewis, Selden R. Glenn and Henry M. Cline, individually and as members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, commanding them and each of them to appear before the Supreme Court of the United States, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and papers upon which said order and decree was entered to be duly authenticated and sent to the Supreme Court of the United States.

Fred Levy, Arnold H. Levy, Stuart G. Levy, James H. Levy, and S. L. Greenebaum, Partners, Trading and Doing Business under the Firm Name of Levy Bros., by Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors.

[fol. 132] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed March 1, 1932

The plaintiffs herein jointly and severally, by their counsel, respectfully represent that in the records and proceed-

ings had in the above-entitled cause, and in the rendition of the interlocutory decree herein appealed from, and also in the rendition of the final decree herein appealed from, there is manifest error, for which each of said decrees herein rendered should be reversed, and as cause for such reversal the plaintiffs jointly and ssverally make the following assignments of errors:

I

Assignments of Errors Committed by the Court, Both

(A) In the rendition of its interlocutory decree, denying plaintiffs' motion for an interlocutory injunction, and

(B) In the rendition of its final decree sustaining motion of defendants to dismiss the bill and thereupon dismissing plaintiffs' bill of complaint.

(1) The Court erred in holding that Section 10 of the Act of the General Assembly of Kentucky, being Chapter 149 of the Session Acts of 1930, which is assailed in the bill as unconstitutional and hereinafter, for brevity, referred to as the challenged Act, affords to the plaintiffs a remedy at law that is plain or adequate or complete, within the meaning of Section 384, Title 28, United States Code.

(2) The Court erred in holding that any remedy at law afforded to plaintiffs by any provision of Kentucky law is plain of adequate or complete, or as practical and efficient to the ends of justice and its prompt administration as the remedy in equity herein sought by plaintiffs.

[fol. 133] (3) The Court erred in holding that any remedy at law afforded by any section of the challenged Act, or by any other provision of Kentucky law, is a remedy at law available to plaintiffs in any Federal Court.

(4) The Court erred in holding that Section 10 of the challenged Act authorizes any action at law against the Commonwealth of Kentucky.

(5) The Court erred in holding that by Section 10 of the challenged Act, the Commonwealth of Kentucky has consented to be sued or has submitted itself to a suit at common law for the recovery of a money judgment for the

amount of any illegal tax exacted of plaintiffs, or for any part thereof, or for any interest thereon.

(6) The Court erred in holding that the Commonwealth of Kentucky, by Section 10 of the challenged Act, or by any other provision of Kentucky law, has waived its immunity under the Eleventh Amendment to the Constitution of the United States from suit against itself or against its Auditor of Public Accounts as its representative, that might be brought by plaintiffs in any court of the United States.

(7) The Court erred in holding that the Commonwealth of Kentucky, by Section 10 of the challenged Act, has consented that it, or its Auditor of Public Accounts as its representative, might be sued at law in any court of the United States in an action by plaintiffs for the recovery of illegal taxes exacted of them under the Act assailed in this case, or has consented that any judgment for the recovery of such illegal taxes, or any part thereof, or any interest [fol. 134] thereon, might be recovered in any action in any court of the United States, or in any other court except a court of competent jurisdiction organized and established under the Constitution and laws of Kentucky.

(8) The Court erred in holding that under Section 10 of the challenged Act, a money judgment may be rendered in any court, either of the United States or of Kentucky, against the Commonwealth of Kentucky or its Auditor of Public Accounts as its representative, for the recovery of such taxes, or any portion thereof.

(9) The Court erred in holding that the remedy at law afforded by Section 10 of the challenged Act, or by any other provision of Kentucky law, is in substance or effect any remedy other than a remedy by way of mandamus compelling the Auditor of Public Accounts to draw his warrant upon the Treasurer of the Commonwealth of Kentucky for the amount of any tax found to be illegal, exacted of plaintiffs under said Act, together with interest thereon, which warrant is restricted by said Act to payment out of the General Fund of the Commonwealth.

(10) The Court erred in holding that under the facts set forth in the bill (and shown by the evidence) no unreason-

able delay would be encountered by plaintiffs in obtaining a refund or a recovery of illegal taxes exacted of plaintiffs under the challenged Act, or any portion thereof, or any interest thereon, through any proceedings authorized under said Act, or any other provision of Kentucky law.

(11) The Court erred in holding that Section 10 of the challenged Act provides in effect for the payment when [fol. 135] presented, or within a reasonable time thereafter, of any warrant that might be issued in satisfaction of any judgment that might be obtained by plaintiffs in any action at law authorized under said Act or any other Kentucky law.

(12) The Court erred in holding that any such warrant, if or when obtained in any action at law authorized under Section 10 of the challenged Act, or by any other provision of Kentucky law, must be paid when presented if there is sufficient money in the General Fund to pay it, in preference to other outstanding warrants previously issued against said General Fund.

(13) The Court erred in holding that Section 10 of the challenged Act makes an exception to the general rule of law prescribed in Section 4688a-4, Kentucky Statutes (Carroll's 1930 Edition), as construed by the Court of Appeals of Kentucky in Rhea, Treasurer, v. Newman, 153 Ky. 604-*618*, to the effect that it is the duty of the Treasurer of the Commonwealth to pay warrants against the General Fund in the order in which they are issued, and further erred in holding that Section 10 of said Act affords to any warrants issued pursuant thereto priority of payment over other outstanding warrants against the General Fund.

(14) The Court erred in holding that any provision of the general law of Kentucky authorizing the Treasurer to stamp warrants against the General Fund presented to him for payment, as interest-bearing, and thereafter allowing interest thereon at the rate of five per cent per annum, payable semi-annually, until called for redemption, affords to plaintiffs any remedy that is plain or adequate or complete, or as practical and efficient to the ends of justice and to the prompt administration thereof, as the [fol. 136] remedy in equity herein sought by plaintiffs.

(15) The Court erred in holding that the mere recovery of interest at five per cent per annum, payable semi-annually, on a judgment for the recovery of taxes illegally exacted, when the current legal rate of interest in Kentucky is six per cent per annum, is sufficient to make the remedy at law as plain or adequate or complete, or as practical and efficient to the ends of justice and the prompt administration thereof, as the remedy in equity herein sought by plaintiffs.

(16) The Court erred in holding that such remedy at law as is afforded by Section 10 of the challenged Act is, or that it would be, adequate or complete, even though no interest be therein allowed to plaintiffs on taxes illegally exacted of them under the challenged Act.

(17) The Court erred in holding that plaintiffs, upon obtaining judgment in any action at law authorized by Section 10 of the challenged Act, or by any other provision of Kentucky law, and upon obtaining warrants issued to them pursuant to any such judgment, can legally or equitably be required, upon the non-payment of such warrants when presented, to hawk them about, in an effort to find a purchaser thereof, or to bargain with any such purchaser upon terms of sale to him.

(18) The Court erred in holding that the remedy afforded by Section 10 of the challenged Act does not involve a multiplicity of suits to recover various successive payments of taxes that may be illegally exacted of plaintiffs under said Act in successive years during the pendency of suits testing the validity of such Act.

[fol. 137] (19) The Court erred in overlooking or disregarding the nature of this suit as a class suit brought by plaintiffs pursuant to Equity Rule 38 and the order of Court made at its inception, on behalf of themselves and a numerous class of other retail merchants similarly situated, more than forty of whom are specifically designated in the orders of Court as protected by the temporary restraining order herein issued, and all of whom have a common or general interest in the various questions herein litigated, as to the constitutionality or validity of said challenged Act, and thus the Court erred in holding that no such multiplicity of actions is involved in the claims

herein asserted by plaintiffs on their own behalf and on behalf of other retail merchants similarly situated as would sustain equitable jurisdiction in order to prevent a multiplicity of actions at law by plaintiffs and numerous other retail merchants similarly situated, as set forth in the bill and in the orders of the Court in this cause.

(20) The Court erred in holding that no basis for relief in equity is afforded by virtue of the drastic penalties provided in Sections 5 and 7 of the challenged Act for failure to comply with the terms thereof or to pay the illegal taxes exacted thereunder, when due according to the terms of said Act.

II

Additional Assignments of Errors Committed by the Court in Its Interlocutory Decree Denying Plaintiffs' Motion for an Interlocutory Injunction

(1) The Court erred in disregarding the rule laid down for such cases in Ohio Oil Company v. Conway, 239 U. S. 613-615, and in refusing to grant an interlocutory injunction to preserve the status of the parties until this cause could be fully heard and finally decided upon its merits.

[fol. 138] (2) The Court erred in declining to consider the issue or question and in therefore failing to hold that the challenged Act designedly denies to plaintiffs and to other retail merchants similarly situated the equal protection of the laws in that, by reason of its classifications prescribed in Section 2 thereof, and its exemptions and credits or deductions provided in Section 4 thereof, and its consequent widely-varying rates of taxation, it unjustly and unreasonably discriminates against plaintiffs and other retail merchants having a large volume of annual gross retail sales, and in favor of other retail merchants having gross annual retail sales in smaller volume, through its unreasonable and arbitrary exaction of taxes from plaintiffs at excessive and grossly disproportionate rates arbitrarily levied in the higher brackets of said Act upon gross retail sales of larger volume, as compared with greatly reduced rates levied in its lower brackets upon other retail merchants having gross retail sales of smaller volume and

therefore taxed at greatly reduced rates or, by reason of credits or deductions allowed them, not taxed at all.

(3) The Court erred in declining to consider the issue or question and in therefore failing to hold that the classification of retail merchants for purposes of taxation prescribed in Section 2 of the challenged Act does not rest upon a reasonable basis, and does not have any reasonable relation to the subject-matter of the Act, and therefore effects an unjust and unreasonable discrimination against these plaintiffs in the matter of taxation upon their gross annual retail sales as compared with the gross annual retail sales of other retail merchants having a smaller volume of such sales, and thus denies to plaintiffs the equal protection of the laws guaranteed to them by the Equal protection Clause of the Fourteenth Amendment to the Constitution of the United States.

[fol. 139] (4) The Court erred in declining to consider the issue or question and in therefore failing to hold that the classification prescribed by the challenged Act, through deductions or credits allowed in Section 4 thereof, is arbitrary and unreasonable and is unjustly discriminatory against the plaintiffs and denies to them the equal protection of the law in that such classification allows to other retail merchants who do business in corporate form a credit or deduction for corporation license taxes paid by them, without allowing to plaintiffs any such credits or deductions or any compensating or corresponding credits or deductions.

(5) The Court erred in declining to consider the issue or question and in therefore failing to hold, upon the evidence adduced at the hearing of plaintiff's motion for an interlocutory injunction, that the challenged Act, in its actual operation and effect, exempts, wholly or substantially so, from the burdens of taxation levied by said Act, competing retail merchants similarly situated, who have a smaller volume of gross sales than plaintiffs, while at the same time levying upon plaintiffs, with their larger volume of gross sales, excessive and exorbitant rates of taxation, wholly out of arithmetical proportion or any reasonable proportion to the volume of sales of other retail merchants exempted wholly, or substantially so, from the burdens of said Act.

(6) The Court erred in declining to consider the issue or question and in therefore failing to hold, upon the evidence adduced at the hearing, that the challenged Act denies to plaintiffs the equal protection of the law in that, in practical effect, it operates to impose upon plaintiffs a grossly excessive and disporportionate burden of the taxes levied [fol. 140] under said Act, merely because of the larger volume of plaintiffs' gross sales, and at the same time exempts, wholly or in part, from the burdens of said taxing law, competitors of the plaintiffs engaged in the same general business of retail merchants—all in complete disregard of capital invested by the taxpayer, or his ability to pay, or his earnings, income or profits accruing from his business of retail merchant.

(7) The Court erred in declining to consider the issue or question and in therefore failing to hold, upon the evidence adduced at the hearing, that the challenged Act unjustly and unreasonably discriminates against plaintiffs and other retail merchants similarly situated, because, in its actual operation and effect, said challenged Act exempts from its burdens a vast number of competing retail merchants doing business in Kentucky in that these plaintiffs, upon their gross retail sales, which aggregate for the taxable portion of the year 1930 $1,253,389.07, are subjected by said Act to a tax of $5,583.89 less a possible disputed credit of $134.61 for automobile license taxes, or a minimum tax exacted of these plaintiffs amounting to $5,449.28, while at the same time, out of approximately 25,000 retail stores competing with these plaintiffs, doing business in Kentucky and having an annual volume of gross retail sales in Kentucky approximating $535,000,000.00, nearly one-third of them are wholly exempted from any tax whatever, and, as shown by the evidence at the hearing of actual returns made to the State Tax Commission, 16,353 retail merchants competing with these plaintiffs, who have reported for the taxable period of the year 1930 gross sales aggregating $247,923,309.00, actually pay in taxes, in the aggregate, only $63,096.56 or less than $3.80 each on the average.

[fol. 141] (8) The Court erred in declining to consider the issue or question and in therefore failing to hold that the challenged Act is unconstitutional and void under the Constitution of the Commonwealth of Kentucky, in that said

Act, in each of the particulars specified in assignments (1) to (7), both inclusive, under this hearing II, captioned "Additional Assignments of Errors Committed by the Court in its Interlocutory Decree Demying Plaintiffs' Motion for an Interlocutory Injunction," violates the fundamental principles of uniformity in the matter of taxation levied upon occupations, persons or property upon a reasonable basis of classification, such as is required by the Constitution of Kentucky.

(9) The Court erred in declining to consider the issue or question and in therefore failing to hold that the challenged Act is unconstitutional and void in that as to taxes claimed of Plaintiffs on account of sales made in the period between March 17, 1930, when said Act was approved, and June 17, 1930, when for the first time it properly became effective under Section 55 of the Constitution of Kentucky, it takes the property of these plaintiffs under the guise of taxation measured by sales made during such period, before said challenged Act could properly become operative or effective for any purpose under the provisions of Section 55 of the Kentucky Constitution, and in such respect said challenged Act denies to these plaintiffs the guaranty and protection of due process of law afforded to them under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Prayer for Reversal

Wherefore, for each and all of the reasons set forth in the foregoing assignments of errors, plaintiffs pray that [fol. 142] each of said decrees herein appealed from, namely, the interlocutory decree and the final decree as hereinbefore set forth, be reversed with directions to the District Court to set aside both of said decrees, and in lieu thereof to render a decree in all respects in accordance with the prayer of plaintiffs' bill of complaint.

Nichols, Morrill, Wood, Marx & Ginter, Trabue, Doolan, Helm & Helm, Solicitors for Plaintiffs.

[fol. 143] In United States District Court

Order Allowing Appeal—March 1, 1932

This day came the parties, plaintiff and defendants, by their counsel, and plaintiff filed herein its petition for ap-

peals to the Supreme Court of the United States from the interlocutory decree and the final decree herein rendered by this Court on December 9, 1931, and filed also its assignments of errors in support of its said petition.

Thereupon it is ordered by the Court:

1. That the appeals to the Supreme Court of the United States prayed by the plaintiff as set forth in its petition for appeal, be and they are each hereby allowed as prayed in said petition.

2. That a transcript of such part of the record and proceedings herein as the parties may by præcipe duly designate, be transmitted, duly authenticated, to the Supreme Court of the United States in the manner provided by law.

3. That a citation be issued, admonishing the defendants and each of them to be and appear in the Supreme Court of the United States within thirty (30) days from this date as provided by law.

4. That one appeal bond for costs and damages upon said appeals, in the penal sum of One Thousand ($1,000.00) Dollars, shall be given by plaintiff, conditioned as provided by law, and in view of the fact that the plaintiff and all other taxpayers claiming the benefit of the temporary restraining order issued in this case have complied with the order and decree of this Court entered December 9, 1931, by giving a bond or other approved security for the payment of estimated taxes that may become due from them respectively for the calendar years 1930 and 1931, it is now ordered that said appeal bond for costs and damages, re-
[fol. 144] quired herein, shall act as a supersedeas bond as well as a bond for costs and damages on appeal.

5. The citation upon appeal shall be issued and the appeal bond and surety thereon herein required shall be approved by the District Judge regularly presiding in this Court.

Chas. H. Moorman, Circuit Judge. A. M. J. Cochran, District Judge. Chas. I. Dawson, District Judge.

[fols. 145-149] Bond on appeal for $1,000.00 omitted in printing.

[fols. 150 & 151] Citation, in usual form, showing service on John B. Lewis et al., omitted in printing.

[fol. 152] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD—Filed March 23, 1932

It is hereby stipulated and agreed that the record on appeal in this case in the Supreme Court of the United States shall consist of the following, omitting the style of the case, and also omitting certificates of oath or acknowledgment, and substituting therefor the words "duly verified":

1. Bill of complaint.

2. Order permitting plaintiff to sue on behalf of all others similarly situated, pursuant to Equity Rule 38.

3. Motion for temporary restraining order.

4. Motion for interlocutory injunction.

5. Temporary restraining order.

6. Order noting appearance of defendants entered by S. H. Brown, Assistant Attorney General, and filing notice required by Statute to be given to Governor, Attorney General and defendants herein, duly acknowledged, and

7. Agreed order that this case be heard with numbers 609 and 611 simultaneously with similar motion in case of Kroger Grocery and Baking Company v. John B. Lewis, et al.

[fol. 153] 8. Motion of defendants to strike certain allegations of plaintiff's bill of complaint.

9. Motion of defendants to dismiss plaintiff's bill of complaint.

10. Answer of defendants.

11. Stipulation (filed herewith) that same evidence read in the case of Stewart Dry Goods Company v. John B.

Lewis, et al., upon the motion for interlocutory injunction was read in this case and that said evidence reduced to narrative form and printed in the said Stewart Dry Goods Company record may be read in this case.

12. Order reading affidavits and other evidence and submitting the case.

13. Opinion of the Court.

14. Order and decree denying interlocutory injunction, and dismissing bill of complaint and continuing temporary restraining order in effect pending appeal upon the giving of bond, entered on December 9th, 1931.

15. Order filing and approving bonds entered January 7th, 1931.

16. Stipulation of parties noting J. Dan Talbott as Auditor of Public Accounts succeeding the defendant, Clell Coleman.

17. Order substituting J. Dan Talbott as party defendant in lieu of Clell Coleman.

18. Petition for appeal.

19. Assignment of errors.

20. Order allowing appeal.

21. Appeal bond.

[fol. 154] 22. Citation and endorsement of accepted service thereon.

23. This stipulation.

Nichols, Morrill, Wood, Marx & Ginter; Trabue, Doolan, Helm & Helm, Solicitors for Appellant. Bailey P. Wootton, Atty. Gen Ky.; S. H. Brown, Asst. Atty. Gen. Ky.; H. W. Batson, J. Whitcomb Welch, Leslie W. Morris, Solicitors for Appellees.

[fol. 155] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 156] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED ON BY APPELLANTS—
Filed April 9, 1932

Appellants seek the reversal of two distinct portions of the order and decree appealed from, namely:

(1) The order dismissing their Bill of Complaint upon the ground that they have an adequate remedy at law.

(2) The order denying their motion for an interlocutory injunction on the same ground.

The points relied on are stated separately and serially under the following headings:

I

Dismissal of Bill of Complaint

Federal jurisdiction clearly exists, and in the Federal Court this cause is essentially one of equitable jurisdiction, for the following reasons:

(1) The appellants are wholly without a remedy at law that is plain or adequate or complete within the meaning of Section 267, Judicial Code (now U. S. Code, Title 28, § 384), as expounded by judicial decisions.

[fol. 157] (2) There is no remedy whatever at law available to appellants in the Federal Court.

(3) The Commonwealth of Kentucky has not waived its immunity from suit in any court. It has not consented to be sued, directly or indirectly, in any Federal Court, or waived immunity from suit therein.

(4) No money judgment for the recovery of taxes illegally exacted of appellants under the challenged Act can be recovered against the Commonwealth of Kentucky or any representative of it in any action brought pursuant to the terms of the challenged Act or any other law of Kentucky. The only remedy provided in such case, by any law of Kentucky, is a proceeding against the Auditor of Public Accounts by way of mandamus to compel him to draw his warrant upon the Treasurer in favor of appellants for the

amount of appellants' claim when ascertained. No action by appellants for any such remedy or relief can be maintained at law in any Federal Court, and the laws of Kentucky restrict to its own courts any such remedy afforded thereby.

(5) Any such warrant upon the Treasurer eventually issued or delivered to appellants under any proceedings at law by them in either State or Federal Court is without right of priority in payment over any other warrants and is restricted to payment out of any moneys remaining in the General Fund after warrants against such Fund previously issued or preferentially handled by the Treasurer shall have been paid.

The taxes illegally exacted of appellants do not go into the General Fund at all, but are exclusively appropriated to other purposes. The General Fund of the State is not augmented thereby.

(6) Claims upon the General Fund are several years in arrears in the matter of payment; consequently any such [fol. 158] remedy at law provided by the challenged Act or by any other Kentucky statute is wholly inadequate. In order for the holder of any such warrants to realize anything on account thereof, it is necessary to hawk them about in an effort to find a purchaser, and to sell them at a substantial discount if a purchaser can be found.

(7) This suit is a class suit brought pursuant to Federal Equity Rule No. 38, as shown by the Court's order entered of record when this suit was brought. It is properly brought in equity to avoid a multiplicity of actions because of its common or general interest to a large number of taxpayers in the same situation as appellants, and also because an overwhelming number of actions by separate taxpayers for successive years would otherwise result. Moreover, equity jurisdiction exists because of the drastic penalties provided by the challenged Act.

II

Denial of Interlocutory Injunction

The points stated under heading I are likewise relied upon under this heading II. For the sake of brevity they are not here repeated.

In addition thereto, appellants rely upon the following points in support of their appeal from the order denying their motion for an interlocutory injunction.

(1) The court below should have granted an interlocutory injunction to preserve the status of the parties until this cause could be fully heard and finally decided in due course upon its merits. (Assignments of Errors II—I.)

(2) The challenged Act designedly denies to appellants and to other retail merchants similarly situated the equal [fol. 159] protection of the laws, by reason of its classifications prescribed in Section 2 thereof, and by reason of its exemptions and credits or deductions provided in Section 4 thereof, and by reason of the consequent widely varying rates of taxation imposed thereby, all of which clearly and designedly effect an unjust, unreasonable and arbitrary discrimination against appellants and other retail merchants having a large volume of annual gross retail sales, in favor of retail merchants who have a smaller volume of gross annual retail sales. (Assignments of Errors II—2, 3, 4, 5, 6.)

(3) The classifications prescribed in Section 2 of the challenged Act, and the exemptions and credits or deductions prescribed in Section 4 thereof, do not rest upon any reasonable basis or have any reasonable relation to the subject-matter of the Act, and they were prescribed for the express purpose of discriminating unjustly and unreasonably against appellants and other taxpayers similarly situated and denying to them the equal protection of the laws. (Assignments of Errors II—2, 3, 4, 5, 6.)

(4) The challenged Act is void under the Constitution of Kentucky in that it violates the fundamental principles of uniformity therein prescribed, which require that classification in the matter of taxation levied upon occupations, persons or property must rest upon some reasonable basis. (Assignments of Errors II—7.)

(5) The challenged Act is void under Section 55 of the Constitution of Kentucky insofar as it seeks to levy upon appellants taxes on account of sales made by them in the period between March 17, 1930, and June 17, 1930, because under Section 55 of the Kentucky Constitution the chal-

lenged Act could not and did not properly become operative or effective for any purpose until June 17, 1930.

In this respect, the challenged Act also violates the Due [fols. 160 & 161] Process Clause of the Fourteenth Amendment to the Constitution of the United States. (Assignments of Errors II—8.)

III

A more detailed statement of the points above digested and relied upon is contained in the Assignments of Errors, to which reference is made for further particulars.

Robert S. Marx, Cincinnati, O.; Frank E. Wood, Cincinnati, O.; Harry Kasfir, Cincinnati, O.; John C. Doolan, Louisville, Ky.; James W. Stites, Louisville, Ky., Solicitors for Appellants.

Service of a copy of the above list of points to be relied upon by Appellants in the Supreme Court of the United States of America is hereby accepted and acknowledged on behalf of the several defendants and Appellees mentioned hereinabove.

John B. Lewis, Selden R. Glenn, and Henry M. Cline, Individually and as Members of the State Tax Commission of the Commonwealth of Kentucky, and J. Dan Talbott, Individually and as Auditor of Public Accounts of the Commonwealth of Kentucky, by Bailey P. Wootton, Atty. Gen.; S. H. Brown, Asst. Atty. Gen.; H. W. Batson, J. W. Welch, Leslie W. Morris, Solicitors for Appellees.

[fols. 162 & 163] In Supreme Court of the United States

Statement of Portion of Record to be Printed by Clerk

Appellants by counsel state that the entire record as filed on appeal herein is, in appellants' opinion, necessary for the consideration thereof. The Clerk is accordingly

directed to print the entire record in the manner prescribed by paragraph 9 of Rule 13.

Robert S. Marx, Frank E. Wood, Harry Kasfir, Cincinnati, O.; John C. Doolan, James W. Stites, Louisville, Ky., Solicitors for Appellants.

Service of notice of the above direction to the Clerk in the matter of printing the record on appeal is hereby acknowledged on behalf of the Appellees.

Bailey P. Wootton, Atty. Gen.; S. H. Brown, Asst. Atty. Gen.; H. W. Batson, J. W. Welch, Leslie W. Morris, Solicitors for Appellees.

[fol. 164] [File endorsement omitted.]

Endorsed on cover: File No. 36,643. W. Kentucky D. C. U. S. Term No. 28. Fred Levy et al., appellants, vs. John B. Lewis, Selden R. Glenn, and Henry M. Cline, etc., et al. Filed March 25, 1932. File No. 36,643.